SUPREME COURT OF MISSOURI,

No. , of March Term, 1867.

JOHN MAGWIRE, *Plaintiff, Respondent,*
vs.
MARY L. TYLER and others, *Defendants, Appellants.*

STATEMENT AND BRIEF,

By Britton A. Hill, *of Counsel for Appellants.*

STATEMENT.

The plaintiff filed his petition in equity against the defendants on the 18th day of September, 1862, in the St. Louis Land Court—removed by change of venue to the St. Louis Court of Common Pleas, Reber, Judge—as junior patentee under one Brazeau, patent dated the 10th of June, 1862, to devest the title of defendants under a senior patent to Louis Labeaume of the 25th of March, 1852, issued on a Spanish survey for Labeaume of 1799, and a confirmation of 22d September, 1810, upon a claim by Labeaume of 26th February, 1806, for confirmation, supported by a possession with substantial inclosures, mansion house and out-buildings, from 1798 to this day.

The general scope of plaintiff's petition is that Soulard, the Spanish surveyor-general, who surveyed the Labeaume tract in 1799, had, by mistake or design, included within its area a small tract of four by four arpents, being a parcel of a tract of four by twenty arpents of land which had been granted in 1794 to Brazeau and sold by him to Labeaume and to Chouteau; that is to say, four by sixteen arpents to Labeaume in May, 1798, and four by four arpents by a previous verbal sale acknowledged by deed of 1816 to Pierre Chouteau. No survey was made of the Brazeau tract by Spanish authority. The Brazeau grant of four by twenty arpents

was to commence *au delà* (immediately beyond) the Big mound, and run north twenty arpents, for quantity, to the vicinity of Stony creek. The Big mound was made by the Indians, and its sides were well defined. In the deed of Brazeau to Labeaume, of 1798, the whole tract of four by twenty arpents of land was conveyed, reserving however four by four arpents of land *at the foot of the Big mound*, which Brazeau had previously sold to Chouteau. Labeaume, after his purchase of four by sixteen arpents of Brazeau, inclosed the same by a formidable stockade, including the sixteen by four arpents of land so purchased. Brazeau had a limekiln south of Labeaume's stockade, and had possessed under the grant to him up to the foot of the Big mound, which was four arpents and twenty feet south of the stockade of Labeaume. Pierre Chouteau, grantor of plaintiff, who had purchased of Brazeau the four by four arpents, now sued for, asked for a larger grant south of Labeaume's stockade in 1799, and having been present at the Spanish survey for Labeaume, making no objections thereto, calls for Labeaume's south boundary as his own northern boundary, and in 1803 procured a Spanish survey on which the stockade of Labeaume is marked as the common boundary between Labeaume and Chouteau. The parties possessed respectively on each side of this boundary from 1799 until 1851, when plaintiff commenced this litigation as a mere champertous speculator under the Chouteau title. In 1816 Chouteau took a formal deed from Brazeau for the land now sued for, bounding it at the foot of the Big mound, and, *ex necessitate rei*, south of Labeaume's stockade. In May, 1826, Chouteau filed in the office of the Recorder of land titles a protest, declaring that this Brazeau reservation, now sued for, north of Labeaume's stockade, was south of it, at the foot of the mound, where the deeds all call for it to lie.

Plaintiff relies upon a clerical error in the minutes of the old Board of Commissioners of 1806 to overthrow these possessions for two-thirds of a century, by a common boundary. Such minutes are not any evidence of any fact therein stated, and yet the court below gave them such weight as to overthrow the possessions of innocent purchasers for fifty years—three decisions of the Supreme Court of the State of Missouri—three decisions of the Supreme Court of the United States—a final decision of the Interior Department of 1851—two patents of the United States of 1852—a former decree of the St. Louis Land Court of 1858 between the same parties and upon the same subject matter and the same facts, in favor of defendants—and a possession actual and notorious for over sixty years. The court below gives no reasons for this decision. The cause was tried before the Hon. SAMUEL REBER, Judge, sitting in equity, under the code of 1855.

ANALYSIS OF BILL AND ANSWER.

Plaintiff's Petition in Equity.	*Answer of Defendants.*
1. A petition of Esther, order of survey, and grant, on the 2d, 3d and 5th of October, 1793, for twenty arpents on the Mississippi river by four arpents in width, the northern part to be between the earth barn (La Grange de Terre) and the river, and thence descending the river to the extent of twenty arpents.	1. Petition and grant admitted by defendants. Order of survey and plat contested by defendants, and charged to be an interlineation in Livre Terrein and a forgery. Averred that the north line of Esther's concession was between the north foot of the Barn mound and the Mississippi river, and ran thence south for quantity, and was so possessed by her.
2. Petition of Brazeau, order of survey, and grant, June 1st, 10th and 25th, 1794, for twenty arpents on the said river by four arpents in width, north of Esther's land, extending from the foot of the hill where stands the Grange de Terre, in a N.N.W. course to the vicinity of Stony creek; bounded south by Esther.	2. Admitted; and averred that Brazeau possessed his grant up to the north foot of the Barn mound, until he sold his reservation to Chouteau in 1798, and the balance of his grant to Labeaume in May, 1798.
3. A deed of Joseph Brazeau to Louis Labeaume, May 9th, 1798, for four arpents in width by sixteen arpents in length, and expressly reserving four by four arpents of the original tract, to be taken at the foot of the hillock (La Grange de Terre) in the southern part of the said four by twenty arpents of land.	3. Admitted; and averred by answer that Labeaume inclosed the sixteen arpents by four, described in the deed, by a stockade, in 1798; and that he and his grantees have held possession of the inclosed land to this day, 79 years; and that plaintiff claims Brazeau's reservation to be within this inclosure, and that the foot of the mound La Grange de Terre is four arpents and 20 French feet south of this inclosure, where the words of the deed describe the reservation to be.
4. Petition of Labeaume for 360 arpents, 20 arpents deep by 16 arpents front; order of survey, 15th February, 1799; and Spanish survey, April 10th, 1799, by Soulard, surveyor, &c., who, by MISTAKE or DESIGN, *made the survey* so as to include the whole of the four by four arpents reserved in the deed of 1798 from Brazeau to Labeaume.	4. Petition, order of survey, and survey, admitted; but it is denied that Soulard made an erroneous survey for Labeaume so as to include the Brazeau reservation, which is called for by the deed creating it to lie at the foot of the mound, four arpents and 20 French feet south of Soulard's survey. It is averred that Chouteau, who bought the reservation of Brazeau before the deed to Labeaume, acknowledged the boundary line of Labeaume as established by Soulard on the line of the stockade, to be the true line from 1799 to 1826.
5. Confirmation of 22d September, 1810, upon Brazeau's grant, his deed of 1798, and Soulard's survey of 1799, of four by four arpents to	5. Admitted that confirmation was made, and averred, that Brazeau made no claim for confirmation, and had no interest in the land

Brazeau, parcel of said grant to him of 1794, and the same land conveyed by Brazeau to Pierre Chouteau in 1816 by deed, and the same land which Brazeau reserved in said deed of 1798.	confirmed; that the Board had no power to make any confirmation to Brazeau; that Chouteau, who then owned the Brazeau reservation and the Esther tract had a confirmation to himself south of Labeaume's tract as surveyed by Soulard, reaching as far north as the north foot of the mound, and that Chouteau, claimed the land between the mound and Soulard's survey for Labeaume under the Brazeau reservation.
6. Confirmation certificate, June 14th, 1811, to Joseph Brazeau, and order of survey to be made agreeably to a reserve made in said deed of 1798, from Brazeau to Labeaume.	6. Admitted; and averred that the confirmation to Brazeau calls for the deed of 1798 as fixing the location of the land confirmed *at the foot the mound*, south of and adjoining the Soulard survey for Labeaume, where Chouteau and Labeaume and their grantees have respectively possessed the lands for sixty-eight years.
7. Deed of June 26th, 1816, from Brazeau to Chouteau of the four by four arpents reserved by the deed of 1798 from Brazeau to Labeaume.	7. Admitted; and averred that this deed calls for the Brazeau reservation three times, as land situated *at the foot of the mound* La Grange de Terre; and that Chouteau and Brazeau, in 1816, admitted in this deed that Labeaume's possession above the stockade inclosure was in accordance with the deed of 1798.
8. Survey by Surveyor General of the United States, in November, 1817, of said four arpents reserved by Brazeau, of two tracts in one—356 arpents for Labeaume, and 4 arpents for Brazeau.	8. Denied that any such survey was approved, and averred that it was illegal, being for two tracts in one; that it was never approved; that it was annulled by the Recorder of Land Titles in 1833, and finally set aside in 1852 by the Secretary of the Interior, when a survey for Brazeau was made of the reservation, and a patent issued for the land at the foot of the mound according to the deed and confirmation.
9. Deed from Pierre Chouteau to G. F. Strother, of June 1st, 1826, for four by four arpents of land in the southeastern corner of the survey of 1817, by Joseph C. Brown.	9. Admitted; and averred that this deed does not convey any land in the United States survey of 1817, or within Labeaume's patent of 1852.
10. Deed of 3d September, 1830, from Strother to Mullanphy and O'Fallon, in trust, for the use of the St. Louis Marine Railway Company.	10. Admitted; and averred that this deed does not convey any land within Labeaume's patent, but is confined to the land described in the deed from Brazeau to Chouteau, lying at the foot of the mound.
11. Deed of Strother in 1840, administration upon his estate, and sale, by order of court, of the four	11. Admitted; but denied that any title passed for any land within Labeaume's patent or elsewhere.

by four arpents to the plaintiff, Magwire, in June, 1846.

12. Deed of 2nd January, 1852, from O'Fallon, surviving trustee for the Marine Railway Company, of said four by four arpents to John Magwire.

13. United States survey of Esther's confirmation, in May, 1859, having its north boundary coincindent with the south boundary of Labeaume's patent.

14. That the four by four arpents of Brazeau are in the southeast corner of Labeaume's patent, as the same was confirmed to Brazeau in 1810, and that said tract honestly belongs to plaintiff.

15. That defendants, combining and confederating with others, on 26th February, 1852, procured a survey to be made by the United States for Labeaume, so as to include the said four by four arpents of Brazeau in the southeast corner of Labeaume's survey, and on the 25th of March, 1852, defendants procured a patent therefor to Labeaume, or his legal representatives.

16. That defendants claim to own the land sued for, under Labeaume's patent.

17. That defendants, prior to their acquisition of their respective interests in said land, had notice of the interest and claim of plaintiff in said land under Joseph Brazeau.

18 and 19. That on the 26th of May, 1862, the United States made a survey of Brazeau's reservation, in the southeast corner of Labeaume's patent, and issued a patent thereon to Brazeau, 10th June, 1862. That the patent and survey for Labeaume, so far as they conflict with the said survey and patent to Brazeau, is a cloud upon the title of plaintiff.

Denied that the sale was valid or legal.

12. Admitted that deed was made, but denied that it passed any title to any land within the Labeaume patent.

13. Admitted; and averred that the survey could have no effect as the Esther grant was owned by Chouteau, who had accepted the Brazeau reservation in 1826, as covering the north end of this survey, and that Esther's grant was annulled in 1797, and was only confirmed in 1836, subject to all older titles.

14. Denied and averred that in a former suit in equity in 1858, for the same equitees now set up and between the same parties, the court has found and decided that the Brazeau reservation was south of Labeaume's patent at the foot of the mound *La Grange de Terre.*

15. Denied; and averred that in said former suit in equity, for the same equities now set up, the court had found and decreed that the survey and patent for Labeaume did not include any part of the Brazeau reservation, which was held to be south of the Labeaume patent, and not within it.

16. Admitted; and averred that they and their grantors have owned it and have possessed it since 1798.

17. Denied; and averred that defendant's ancestors and grantors bought the land included in the Soulard survey before any other survey was made for Brazeau or Esther, paid a full consideration, succeeded to Labeaume's possession in 1816, fifty-one years ago, and have held possession ever since.

18 and 19. Admitted; and averred that the survey of 1862 was made without any authority of law, more than ten years after another survey and patent had been made, on a decision by the Secretary of the Interior, and after rights had vested under the former patent and survey, and after plaintiff had conveyed to L. V. Bogy his interest in the land covered by the first survey and patent to Brazeau of 1852.

20. That the patent and survey for Labeaume are older than the patent and survey for Brazeau, and plaintiff has continually asserted the validity of the former and the invalidity of the latter.	20. Admitted that the Labeaume patent is the elder, and averred that it is the only valid title for any land within its area. Denied that plaintiff has made any assertion of title before 1851.

21. Prayer—That the court will divest out of defendants all the right, title and interest acquired by them from Labeaume, and vest the same in plaintiff, and put him in possession, that an account may be taken of rents and profits, and that plaintiff may have judgment therefor, and for other and further relief.

Defendants further answered as follows:

"That the premises in controversy are situate on the river Mississippi, about four arpents north of the Big mound, a most noted monument in St. Louis, called by the French La Grange de Terre, (earth barn). This mound is an artificial erection situate on the brow of the first bank of the prairie, west of the bank of the said river, at the distance of about 28 arpents north of the northern wall of the fortifications of the old Spanish town of St. Louis, and about four and a half arpents west from the bank of the river. The bank on which the mound stands is the eastern boundary of the Grand prairie covered by the St. Louis common fields; and the land descends with a gentle slope from the brow of it to the small prairie, or bottom land, between it and the river. This bank of the prairie is about 4½ arpents west of the river bank, where the mound stands, and about 60 feet above the level of the prairie along the river, and it runs nearly parallel with the river, at that distance from it, for a mile or more towards the south. At the north foot of the mound, this bank of the prairie curves towards the northwest, and running to the southwest corner of the southern and western ditches of Labeaume, as marked on the Spanish survey of Labeaume's concession, in 1799. It thence runs about 16 arpents northwardly parallel with the river, at the distance of about 7 arpents from the bank of the river, where it becomes broken, and the land descends more or less abruptly into a small creek, called the Rocky branch, about 25½ arpents north of the mound. South of the Big mound, about 18 arpents distant, there are small mounds on the same bank of the prairie. The bank of the prairie is higher where the Big mound stands than at any other point between the old town of St. Louis and the Rocky branch.

"The first Spanish grant north of the town of St. Louis, on the Mississippi river, was made to Esther, a mulattress, in October, 1793, by the following description:—'The north part of the present con-

cession shall be situated between the hillock named the Earth Barn and the banks of the Mississippi; thence descending the said river as far as the complement and extent of 20 arpents in length,' &c. This description locates the north line of Esther between the Big mound and the river, and the call for quantity is to the extent of 20 arpents south of that point on the river.

"The second Spanish grant on the river north of the town was made in June, 1794, to Joseph Brazeau, under whom the plaintiff claims. Brazeau petitioned for lands situated *beyond the foot of the mound* called the Earth Barn, of the width of four arpents, &c., and the grant to him was for 4 by 20 arpents, 'from the foot of the hill where the Earthern Barn is situated, thence up to the environs of the Rocky branch,' &c.

"No Spanish or United States survey has ever been made of either of these grants, but Esther and Brazeau took possession of their respective tracts of land so granted, the one south of, and the other north of, the Big mound. Esther possessed as the land granted to to her that portion which lay south of the Big mound, between it and the small mounds embracing the little prairie, between the bank of the prairie and the river Mississippi; and Brazeau possessed as the land granted to him, the little prairie north of the Big mound along the river. He cultivated fields up to the foot of the Big mound, and built a limekiln on the bank of the river, about 2½ arpents north of said mound. The Big mound was the great natural monument that designated the division line between the possessions of the two parties, Esther and Brazeau, in Spanish times.

"On the 2d of September, 1794, Esther conveyed her interest in the grant to her, to Jacque Clamorgan, her lord and master, by deed, and Joseph Brazeau was a subscribing witness thereto. In August, 1797, the Esther grant was annulled by the lieutenant governor, for the reason that the delay granted to begin improvements had expired, and a grant of 600 feet square was made at the same time to Antoine Roy upon the same land, that is, upon the southern portion of Esther's grant. (See Roy's grant.)

"When Soulard, the Spanish surveyor-general, was about to survey the Roy tract, he notified Clamorgan as the owner of the Esther grant, according to the Spanish custom, and Mr. Clamorgan formally claimed 'that the ground on which he was operating had been granted to him for a number of years.' The southwest corner of the Roy tract is 19 arpents south of the north foot of the mound, and about 23 arpents south of Labeaume's south ditch.

"On the 9th of May, 1798, Brazeau sold, by deed, 4 by 16 arpents of his tract to Louis Labeaume, under whom defendants claim, and reserved his fields and limekiln, near the Big mound. The descrip-

tive works of the deed are, 'which consists of four arpents of land, to be taken from the foot of the hill or mound commonly called La Grange de Terre — the earth barn — by twenty arpents in depth, bounded by the Rocky branch at the extremity, which is opposite the said mound, east by the Mississippi river, and west by the king's domain' — the said Brazeau 'reserving to himself four arpents of land from the foot of the mound in the south part of the tract." This deed was executed before the lieutenant governor, who officially certified to the sale. The confirmation under which the plaintiff claims was void, the board of commissioners, in 1810, having no jurisdiction of Brazeau's claim, for want of notice to the recorder of land titles thereof by Brazeau.

"Labeaume, after said purchase of Brazeau, immediately inclosed the land with embankments of earth and ditches, the height of the embankments from the bottom of the ditches being about six feet, and on the top of the embankments pickets were driven into the ground so as to make a stockade inclosure. He also erected houses upon the grounds inclosed, and lived there with his family from 1798 until 1814, and left his agent in possession from that time until April, 1816, when he sold to William Chambers. The north and south ditches of Labeaume were 16 arpents and 40 French feet apart. Brazeau's limekiln was 300 feet south of the south ditch of Labeaume, and he worked that kiln and cultivated the fields south of the ditch up to the time he sold to Labeaume, and after the sale he rented the kiln to one Primeau.

"It appears from a deed, made by Brazeau to Pierre Chouteau in 1816, that at the time of the deed to Labeaume, of 1798, Brazeau had made a verbal sale of the 4 by 4 arpents at the foot of the mound to Pierre Chouteau. (See deed referred to.)

"In February, 1799, Labeaume asked for a grant of 360 arpents 'of land including the part which he had acquired of Brazeau, that is to say, 20 arpents in depth from the Mississippi along the Rocky branch west one-fourth south, by 16 arpents front along the river, to be taken at the descent of the road into the branch, which is the very front of the petitioner's land; the angle formed by the line perpendicular from the road to the river will nearly complete the land demanded by the petitioner,' &c. (See petition and grant referred to.)

"On this petition the same lieutenant governor who certified to the Brazeau reservation ordered a survey the 17th February, 1799, and on the 2d of March, 1799, Don Antonio Soulard, Spanish surveyor of Upper Louisiana, made the survey in the presence of the adjoining neighbors, according to the Spanish custom, and returned the plat and notes of survey, which were duly recorded in the archives of the government on the 15th of April, 1799. On Soulard's

survey the ditches are marked, and the houses of Labeaume, and the the quantity of land surveyed was 374 arpents. The south ditch of Labeaume is 4 arpents and 20 French feet north of the north foot of the Big mound, at a point 4 arpents west of the river.

"The reservation of Brazeau by his deed, of 4 by 4 arpents on the Mississippi, from the foot of the Big mound, locates it south of and adjoining the southern ditch of Labeaume.

"In February, 1806, Labeaume filed his claim for confirmation, under the act of Congress of the 2d March, 1805, as follows: 'Louis Labeaume (claimed) 374 arpents of land, conceded in part to Joseph Brazeau the 20th June, 1794, and the other part to Louis Labeaume the 15th of February, 1799, settled and cultivated since both these dates. Under this claim he filed the following paper, evidences of title, pursuant to the act of Congress, and they were duly recorded by the recorder of land titles, to wit:

"1. The petition of said Brazeau for 4 by 20 arpents.

"2. The order of survey of Zenon Trudeau, lieutenant governor, thereon.

"3. The grant to Brazeau of 4 by 20 arpents.

"4. The certificate of the sale of 4 by 20 arpents by Brazeau to Labeaume, with a note of the reservation of 4 arpents written on the grant by the lieutenant governor, as follows: 'I do certify, that the above concession, except 4 arpents, has been sold, &c., to Louis Labeaume, by deed, proven before us, the 9th of May of this year, and deposited in the archives of this post. St. Louis, of Illinois, the 12th of May, 1798. Zenon Trudeau.'

"5. The petition of Labeaume for an extension of the 16 arpents front purchased of Brazeau, 20 arpents west, and for the angle at the Rocky branch, about 360 arpents.

"6. The order of survey by Trudeau to Soulard.

"7. The survey by Soulard of 374 arpents, and his plat thereof, for Louis Labeaume."

"On the presentation of this claim upon the foregoing papers, the clerk who read the certificate annexed to the grant to Brazeau supposed the four arpents reserved were within Soulard's survey of 374 arpents, and he entered in the minutes that Labeaume's grant included the whole of the Brazeau grant. This was a mistake of the clerk, who did not have the Brazeau deed before him, but only the governor's certificate. Mr. Labeaume abandoned all claim under the Brazeau grant, and demanded a confirmation directly under the one to himself—the Soulard survey. The board, upon proof of possession, in 1800, by Labeaume, and that he was the head of a family, confirmed to him 356 arpents, and 4 arpents to Joseph Brazeau, and ordered that the same be surveyed agreeably to a concession from

Zenon Trudeau to Louis Labeaume, and as respects the four arpents agreeably to a reserve made in a sale from Brazeau to Labeaume, recorded in book C, page 339, of the recorder's office. This confirmation was made 22d September, 1810, and confirmation certificates were duly issued—one to Labeaume and one to Brazeau. Brazeau, at the time of his confirmation to him, did not own, or claim to own, the said reservation; he had sold it to Pierre Chouteau, who had included the whole of it in a larger grant made to him by an order of survey of October, 1799, surveyed the 17th of June, 1803. In P. Chouteau's petition of 1799, he asked for the land bounded *north by the line of Mr. Labeaume's tract*, south by the line of Mr. Antoine Roy's tract, east by the river, and west by the domain of his majesty.

"Chouteau was the owner of the Brazeau reservation at the time of the Soulard survey of Labeaume's tract. In June, 1803, when Chouteau's grant was surveyed by Mr. Soulard, the parties, Labeaume and Chouteau, were present, and Labeaume's south ditch was marked upon the plat as a part of the north line of Chouteau's tract, and the surveyor returned his plat of boundaries, stating thereon that Chouteau's tract was bounded north by the land of Louis Labeaume. (See grant and survey.)

"This confirmation to Brazeau, under which plaintiff claims, is null and void; the board had no jurisdiction over the Brazeau case, and no notice had been filed by Brazeau, or any one for him, for the confirmation. Pierre Chouteau procured a confirmation in 1809 from the same board of commissioners for the land between Labeaume and Roy. He purchased the Esther claim of Clamorgan in 1810, and procured the formal title of the reservation from Brazeau, in 1816, by deed, which describes the reservation three times as land 'to be taken from the foot of the mound called the Earth Barn.' (See deed from Brazeau to Chouteau.)

"In 1817, Rector and Barcroft entered for Henry Peyroux all the land south of Labeaume's south ditch, including the reservation and all of Pierre Chouteau's tract, under a New Madrid earthquake certificate, No. 184. Pierre Chouteau, on the 20th of May, 1826, protested in writing to the commissioner of the General Land Office against the issuing of a patent on said certificate, that it covered the whole of a small tract of 16 arpents which he had purchased from a Mr. Joseph Brazeau, to whom it had been confirmed by the board of commissioners. This is a solemn act of location by Chouteau of the reservation south of Labeaume's tract. Chouteau conveyed the reservation to Strother in June, 1826; Strother's administrator to John Magwire in June, 1846; and Magwire founds his suit on this title through Pierre Chouteau. The plaintiff has no conveyance from Brazeau for any land north of the south ditch of

Labeaume. If Brazeau's grant was included within Soulard's survey for Labeaume, then Mr. Brazeau located his reservation in the wrong place; but if the mistake in the deed of Brazeau to Labeaume be admitted, and if he located his reservation at the foot of the mound when he intended to locate it north of the south ditch of Labeaume, it is too late to relocate now, for the title of Brazeau passed to Labeaume, in 1798, for the whole of Brazeau's tract, excepting only the 4 by 4 arpents at the foot of the mound. If Brazeau had no land where he reserved these 16 arpents, he, or Chouteau, his vendee, should have proceeded to correct the mistake in the deed of 1798 during the time Labeaume held the title. But Labeaume held possession according to the terms of his deed and Soulard's survey for eighteen years, when he sold the whole tract of 374 arpents to William Chambers by deed of April, 1816, for $7,460, a full consideration, and Chambers had no notice of the alleged mistake in the location of Brazeau's reservation, and he was not put upon inquiry by the title papers; and he was an innocent purchaser for a valuable consideration of the tract embraced within the Soulard survey. Up to the purchase by Chambers, the grantor of the defendants, there never had been any claim by Joseph Brazeau or Pierre Chouteau for the location of the reservation north of the south ditch of Labeaume. From 1779 until 1826 Mr. Chouteau had acquiesced in the possession of Labeaume to the south ditch, which ditch was established by the surveyor-general of the Spanish province of Upper Louisiana, in March, 1799, as the division line of stockade fence between Labeaume's land and Brazeau's reservation, and this is an estoppel against Pierre Chouteau and all persons claiming under him, including the plaintiff.

"In October, 1799, Mr. Chouteau, in his petition to the lieutenant governor, recognized the ditch and stockade fence of Labeaume as the boundary between Labeaume and himself; and he calls the land north of that boundary, Labeaume's land. In June, 1803, Mr. Chouteau's survey of his grant was made by the same surveyor, in his presence, and in the presence of Labeaume, when the stockade fence or ditch of Labeaume was again officially recognized and established as a division fence between Labeaume and Chouteau. For sixty-four years prior to this suit, Labeaume and Chouteau, and their grantees, have possessed their land, the one south of, and the other north of, the line of this stockade fence and ditch so recognized and established as the boundary line between their respective tracts. And these defendants further state, that by the said recognition of the south ditch of Labeaume as the boundary line between the lands of said Pierre Chouteau and Louis Labeaume for so long a period of time, they, the said Pierre Chouteau and Louis Labeaume, and all persons

claiming through or under them as parties or privies, are mutually bound and estopped from disputing the same or claiming adversely thereto; and that the long possession of said parties and their privies of the said several tracts of land in accordance therewith, has vested a complete title in the said representatives of Louis Labeaume to the land in United States survey No. 3333.

"These defendants aver, that the said southern ditch was dug for the purpose of making an embankment on the northern margin thereof, to serve as an inclosure, and on the top of the said embankment pickets were driven into the ground, so as to make a stockade inclosure of that part of Louis Labeaume's tract.

"Defendants deny that Louis Labeaume ever recognized the right of a proprietorship of said Joseph Brazeau to said sixteen arpents of land known as Brazeau's reservation, at any other place than as located by said United States survey No. 3332, for Joseph Brazeau's legal representatives, and the possession of said Brazeau and of Pierre Chouteau, his grantee of said reservation, was in accordance with said United States survey No. 3332, and the said Labeaume always claimed the land within Soulard's survey, and the survey of the United States No. 3333, as the land belonging to him.

"Defendants aver that said land north of Labeaume's ditch was always held in possession by actual possession and by notorious acts of ownership on the part of Chambers, Christy & Wright, and their representatives and grantees, from and after the year 1816 until the year 1851, continuously, and adverse to all other persons.

"These defendants deny that the said deed of the 26th day of July, 1816, conveyed the said Brazeau tract to said Pierre Chouteau, or any part thereof north of said southern ditch of Labeaume; but, on the contrary thereof, the said deed only purports to convey four arpents by four arpents at the foot of the Big mound, south of said southern ditch of Labeaume.

"These defendants deny the said survey of 1817 was made by authority of the surveyor-general of the United States for the district of Illinois and Missouri; and they deny that the said four by four arpents of the Brazeau reservation were surveyed under said alleged survey of 1817. And these defendants aver that said survey of 1817 was not made pursuant to any lawful instructions; and they further aver that the said survey was never approved according to law, but, on the contrary thereof, the said survey was signed by the surveyor-general by mistake, and the same was annulled and disproved, and never was held or regarded as a valid or binding survey by the United States.

"Defendants have no knowledge or information sufficient to form a *belief*, whether the property personal belonging to the estate of

said George F. Strother was insufficient to pay and satisfy the debts established against said estate; nor whether said administrator made application to said Probate Court in due form of law, and obtained an order from said court authorizing said administrator to sell said real estate as alleged; nor whether said Brazeau's reservation, located as claimed by plaintiff, was included therein; nor whether said premises in question were sold in conformity with law, as stated in plaintiff's petition.

"Defendants deny that the plaintiff acquired the right, title, and interest of the Marine Railway Company in and to the premises in question by deed of the 2d day of January, 1852, as alleged, and defendants have no information or knowledge sufficient to form a *belief* whether the said John O'Fallon was authorized in due form of law by the said Marine Railway Company to convey the said premises in question to the plaintiff.

"These defendants deny that the said tract of land alleged to have been confirmed to Joseph Brazeau, and to have been acquired by plaintiff, is designated or known by any such description or boundaries as are set forth in plaintiff's petition; but, on the contrary thereof, it is well known as four by four arpents at the foot of the mound, called La Grange de Terre, bounded north by the southern ditch of Labeaume's tract, and east by the river Mississippi.

"These defendants deny that they ever fraudulently or unlawfully procured a survey or patent to be issued to said Louis Labeaume's legal representatives for any land, or for any part or the whole of said four by four arpents of land alleged to have been confirmed to Joseph Brazeau's representatives; and these defendants deny that said four by four arpents of land, conveyed to Pierre Chouteau by said Brazeau, is within said patent to the said Louis Labeaume or his legal representatives; and these defendants deny that said patent vests in the representatives of Louis Labeaume the legal title to any part of said four by four arpents described in said deed from Brazeau to Chouteau, or any part of the four by four arpents described in the deed of Brazeau to Labeaume, and referred to in the alleged confirmation to Brazeau.

"These defendants deny that at the time said patent was issued to Labeaume's representatives, any equitable right or claim to any land within the boundaries of said patent were vested in the plaintiff by virtue of any purchase or any deed of conveyance hereinbefore mentioned; and these defendants deny that at the time when the said patent was issued to Labeaume's representatives, they or either of them had any knowledge or notice of the plaintiff's pretended equitable right or claim to said four by four arpents of land as alleged by plaintiff.

"These defendants severally deny that at the time they or either of them severally acquired their several rights or interests in or to said four by four arpents of land, they or either of them had any notice or knowledge of any equitable right or claim of said Joseph Brazeau or his legal representatives to the whole or any part of said four by four arpents of land as lying within the boundaries of Labeaume's patent.

"These defendants deny that said plaintiff is the legal representative of said Joseph Brazeau as to any land within Labeaume's patent. And these defendants deny that plaintiff is rightfully or equitably entitled to any land within Labeaume's patent.

"These defendants deny that the said tract of four by four arpents of land confirmed as alleged to said Brazeau, was ever definitively located as claimed by plaintiff within Labeaume's patent, or elsewhere, except at some point south of the southern ditch of Labeaume.

"These defendants deny that said Daniel A. Rawlings is the tenant of Mary L. Tyler, in possession of the said lots 1, 2, 3, and fractional lot A, in block 288. And aver that said plaintiff fraudulently procured the tenants of William Chambers before his death to attorn to him, the plaintiff, and fraudulently procured possession of said block of ground some time in the year 1849.

"These defendants aver that under the said confirmation to Louis Labeaume, and pursuant to the certificate of confirmation thereon, an United States survey of said confirmation was duly made and approved by the surveyor-general of Illinois and Missouri in 1852; and the said survey was duly certified to the recorder of land titles, and he issued a patent certificate thereon, and thereupon the United States duly issued and delivered a patent pursuant to said survey to Louis Labeaume and his legal representatives, and said survey and patent include the premises sued for by the plaintiff, and the defendants severally derive their title to the said premises from and through said Louis Labeaume. Said patent issued 25th March, 1852.

"These defendants further aver that under the said alleged con firmation to Joseph Brazeau, and pursuant to the certificate of confirmation thereon, an United States survey of said Brazeau's confirmation was made and duly approved by the surveyor-general of Illinois and Missouri in 1852, and the said survey was duly certified to the recorder of land titles, and he issued a patent certificate thereon, and thereupon the United States duly issued a patent, pursuant to said survey, to Joseph Brazeau and his legal representatives, and said survey and patent, under the said confirmation, do not include the premises in controversy, or any part thereof. And these defendants aver that the said patent to the said Joseph Brazeau or his legal representatives, was duly forwarded to the recorder of land

titles to be delivered to the legal representatives of Jose ph Brazeau, and that the same was demanded by one of the legal representatives of Joseph Brazeau of the said recorder of land titles, but the same was refused to be delivered; and although the said Brazeau's patent has been introduced in evidence in two actions, (one wherein John Magwire was plaintiff and Vice was defendant in the St. Louis Court of Common Pleas, and one wherein Edw'd M. West was plaintiff and Joseph Cochran was defendant, in the Circuit Court of the United States for the Eastern District of Missouri,) yet the said patent of the Brazeau reservation remaining in the hands of said recorder of land titles for about six years has been ordered by the commissioner of the General Land Office to be returned to Washington, upon the false pretence that no one of the representatives of Brazeau would receive the same.

"Defendants aver that said United States survey of said respective confirmations are conclusive evidence of the location of each of said tracts, and concludes both the plaintiff and the defendants; that the confirmation of each of said tracts was subject to the condition of survey, and that each of said patents are conclusive evidence of the location of each tract embraced therein, in strict accordance with the confirmation, and is binding upon the United States, the plaintiff, and all other persons.

"Defendants further aver, that plaintiff conveyed the whole of said Brazeau reservation lying south of the said southern ditch of Labeaume to Louis V. Bogy by deed dated the sixth day of June, 1846, which deed is herewith filed as an exhibit. Defendants aver, that the location as given by said surveys Nos. 3333 and 3332, and the said patents, are the true and correct locations of said two tracts of land under the said confirmations.

"Defendants aver, that the pretended confirmation to Joseph Brazeau was wholly void, for want of jurisdiction in the board, and that no title for any land could pass to Brazeau thereunder, and that the patent vests the only title ever granted to him for Brazeau's representatives or to his legal representatives by the government of the United States.

"Defendants further aver, that William Chambers, William Christy, and Thomas Wright, in 1816, were innocent and bona fide purchasers, for a full, fair and valuable consideration, of the said Labeaume tract and the land included within the survey of Don Antonio Soulard, of 1799, which is identical with the United States survey No. 3333; that they had no notice of the pretended claim of Brazeau for said sixteen arpents of land within the said Soulard survey, and the defendants are in like manner innocent bona fide purchasers and representatives of said Chambers, Christy and Wright.

And the defendants, and those under whom they claim, have been in the actual, adverse and continuous possession of the premises sued for for more than ten years next before the commencement of this suit.

"Defendants further aver, that the plaintiff is barred and precluded from claiming or having the relief prayed for, by reason of the great lapse of time since the alleged error in the location of said Brazeau's reservation, and by the great lapse of time since the same was discovered by the plaintiff.

"Defendants further aver, that the title to the sixteen arpents front by four arpents in depth acquired by Labeaume in 1798 under the deed from Joseph Brazeau to him, was a just title; that the said deed gave a title capable of transferring the property; that said Brazeau was then resident in the town of St. Louis, where said land was situate, and continued so to reside therein for more than ten years thereafter; that said Labeaume, immediately after the said deed was executed, dug the said ditches, and made the said embankments, and put pickets thereon, and thereby inclosed the premises in question sued for, and held the same as his own so inclosed, and lived thereon for more than ten years successively prior to the first day of January, 1816. Whereby said Labeaume acquired all the right, title and estate of said Brazeau, by the Spanish law of prescription then in force in the territory of Missouri and the territory of Upper Louisiana; and these defendants deny all confederacy and all combination for the purpose of keeping plaintiff out of possession of said premises, or for any purpose; and these defendants deny having hindered or prevented the plaintiff from having, possessing, using or enjoying the said land, in any manner otherwise than they would hinder any person without any right or title from taking possession of their property of which they and those under whom they claim have been possessed for more than a half a century.

"Defendants severally deny that plaintiff has sustained any damage by reason of the premises; and they have no knowledge or information sufficient to form a belief what the rents and profits of said premises in the aggregate would amount to."

Defendants, further answering, say in substance, that the same identical equities set up in this suit, were set up in a former suit in equity, commenced by plaintiff against the defendants and their grantors, in the St. Louis Land Court, upon substantially the same petition and answer, on the 22d day of August, 1855, when the code of 1849 was in force; and upon a trial of said former suit in equity the court, on the 22d day of June, 1858, entered the following finding and judgment:

"This cause came on to be heard before the court, and after hearing all the evidence of the parties, the court find from the evidence the following facts, viz:

"That on the fifth day of October, in the year 1793, the Spanish government conceded or granted to one Esther, a free mulattress, a tract or parcel of land situate on the border of the Mississippi river, and between that and the earth-barn, La Grange de Terre, as stated in the plantiff's petition. The concession to Esther had no definitive location by the terms of the grant, but she took possession under said grant of a tract of land lying between the Big mound and the Mississippi river.

"That on the twenty-fifth day of June, in the year 1794, the said Spanish government conceded or granted to one Joseph Brazeau a tract or parcel of land of four arpents in front by twenty arpents in depth as described and bounded as stated in the plaintiff's petition. That the said Brazeau took possession of the said tract or parcel of land so granted by said government about the time of said concession. That afterwards, on the ninth day of May, in the year 1798, the said Joseph Brazeau, by his deed of that date, sold and conveyed the said tract or parcel of land conceded and granted to him as aforesaid to one Louis Labeaume, excepting, however, and said Brazeau in his said deed reserved to himsslf four arpents of said tract of land 'to be taken at the foot of the hillock in the southern part of said land;' that the said four arpents so reserved by said Brazeau in his said deed to said Labeaume are situate within the limits of the outboundary line of the village of St. Louis, run in conformity to the first section of the act of Congress making further provision for settling the claims to land in Missouri territory, approved June 13, 1811.

"That after said sale and conveyance to Labeaume by Brazeau, but prior to the fifteenth day of February, in the year 1799, the said Louis Labeaume petitioned said Spanish government for a grant of three hundred and sixty arpents of land including that which he had acquired of said Brazeau — that is to say, twenty arpents in depth from the Mississippi river, ascending Rock branch west quarter south by sixteen arpents front, along the Mississippi, to be taken from the descent of the road into the creek as stated in plaintiff's petition; that said Spanish government caused the land petitioned for as aforesaid by said Labeaume to be surveyed by one Antonio Soulard, acting surveyor under said government at the time stated in plaintiff's petition — which said survey does not embrace any portion of the land reserved by Joseph Brazeau in said deed to Labeaume, dated the 9th day of May, 1798.

"That the board of commissioners for the adjustment of land titles

in the territory of Missouri on the twenty-second day of September, in the year 1810, confirmed to said Joseph Brazeau the said four arpents.

"That the said commissioners on the fourteenth day of June, in the year 1811, issued their certificate of confirmation, No. 983, as stated in the plaintiff's petition. That the said Joseph Brazeau and his wife, on the twenty-sixth day of June, in the year 1816, by their deed of that date, conveyed all their right, title and interest in said four by four arpents of land to one Pierre Chouteau, which deed was duly recorded as stated in plaintiff's petition.

"That in the month of November, in the year 1817, by authority of the United States, and under the direction of the surveyor-general for the district of Illinois and Missouri, the said four by four arpents of land were surveyed by Joseph C. Brown, of which the following is a copy:

(For map, see the original, page 34.)

"No. 982 & 983.

"Township, No. 45 north, Range No. 47 E. of 5th Principal Meridian.

"Surveyed for Louis Labeaume *two* tracts in one. The one confirmed in his own name for 356 arpents. The other under Joseph Brazeau for 4 arpents, together 360 arpents, equal to 306¼ acres, beginning at the mouth of the branch, the S. E. corner of Easton's tract. Thence down the Mississippi river bending therewith:

"S. 24 deg. E. 12 chains; S. 33 deg. E. 14 chains; S. 35 deg. E. 13 chains; S. 27 deg. E. 8 chains; S. 25 deg. E. 13 chains.

"S. 24 deg. E. 15.50; a stone at the mouth of an old ditch, the lower corner on the river.

"Thence S. 74½ W. 11 chains, 50 links, intersects the line of the common fields 63 chains, 50 links; a stone the southwest corner of the tract.

"Thence N. 15½ W. 10 chains, 20 links, to the branch where the road crosses. Thence meandering down the same:

"N. 50 deg. E. 2 chains, 50 links; N. 25 deg. W. 5 chains, 70 links; E. 2 deg.; N. 6 deg.; N. 70 deg. E. 3 chains, 70 links; N. 2 chains, 86 links; W. 3 chains, 50 links; N. 25 chains, E. 4 links; N. 60 E. 1 chain, 50 links; N. 36 deg. E. 2 chains, 50 links; N. 80 deg. E. 2 chains, 50 links, the mouth of the branch at the beginning.

"(Signed) JOSEPH C. BROWN,

"November, 1817. *D. S.*

"That on the first day of June, in the year 1826, Pierre Chouteau and wife, by their deed of that date, conveyed the said four by four arpents to one George F. Strother; which deed was duly recorded, as stated in the plaintiff's petition. That said George F. Strother

and his wife, on the third day of September, in the year 1830, by their deed of that date, conveyed the said four by four arpents of land, with other tracts of land, to John Mullanphy and John O'Fallon, in trust for the sole use and behoof of the Marine Railway Company.

"That in the month of November, in the year 1840, the said George F. Strother departed this life, and administration in due form of law was had on his estate, and in like due course of law all the right, title, interest and estate of the estate of said Strother in and to said four by four arpents of land were sold by the administratrix of said estate and conveyed to the plaintiff.

"That on the second day of January, in the year 1852, John O'Fallon (the said John Mullanphy having before that departed this life), by authority and direction of said Marine Railway Company, conveyed by deed all the right, title and interest of said Marine Railway Company to the plaintiff in the land north of the ditch called Labeaume's ditch.

"That the said tract of four by four arpents of land which was confirmed to said Joseph Brazeau is situate in the northern part of the present city of St. Louis, in the county of St. Louis, on the south side of an old ditch called and known as Labeaume's south ditch.

"That the said Pierre Chouteau, under whom plaintiff claims title to the land in question, on the fifteenth day of October, 1799, petitioned for a tract of land between Roy and Labeaume, of the width of six arpents. That Labeaume's ditches were then made; that Chouteau in his petition called for the line of the land of Louis Labeaume for his northern boundary; that at this time Joseph Brazeau had promised to convey the four by four arpents to said Pierre Chouteau. That at the time of the survey made in 1803, the south ditch of Labeaume was recognized by all the adjoining proprietors as Labeaume's south line; and that possession was claimed and held with such recognition from the time of said survey in 1803 until about 1823. That all of the defendants respectively claim title and the right to possess the part and parts which they do respectively possess and claim of said four by four arpents of land, under one Louis Labeaume or his legal representatives; and that the defendants do hold, claim and possess portions of said tract of four by four arpents in the manner and to the extent stated in the plaintiff's petition. And that the said tract of four by four arpents of land, at the time of the confirmation thereof to said Joseph Brazeau as aforesaid was not definitively located by the metes and bounds. That on the tenth day of September, 1810, Jacque Clamorgan, who claimed the Esther grant by deed from her, the 2d September, 1797, conveyed the same grant to said Pierre Chouteau.

"And from the evidence aforesaid, the court further finds that said Labeaume, in February, in the year 1806, filed his claim for confirmation before the said board of commissioners for the adjustment of land titles for the territory of Missouri, and said board of commissioners confirmed to him three hundred and fifty-six arpents, and to Joseph Brazeau four arpents, as stated in defendants' answer.

"That said Labeaume made the ditches and inclosures mentioned in the defendants' answer. That under the said confirmation to said Labeaume a survey of the tract of land so confirmed was ordered by the secretary of the department of the interior of the United States government; and in the year 1852 a survey thereof was made under and in pursuance of the instructions of said secretary; and which survey was afterwards approved on the twenty-sixth day of February, in the year 1852; and thereupon a patent certificate was issued by the recorder of land titles, certifying to the effect that Louis Labeaume or his legal representatives was entitled to a patent under said confirmation and survey for $339\frac{69}{100}$ acres, equal to $399\frac{70}{100}$ arpents. That afterwards, and on the twenty-fifth day of March, in the year 1852, a patent was issued by the government of the United States, granting said tract of land described in the last-mentioned survey to said Labeaume or his legal representatives, and to his or their heirs and assigns; saving and reserving, however, any valid adverse rights which may exist to any part thereof.

"That when said last-mentioned survey was made, and also when said patent was issued, as aforesaid, to said Labeaume or his legal representatives, the defendants had knowledge that the plaintiff claimed to be the legal representative of said Joseph Brazeau, under and in virtue of the deeds and conveyances and the documents and proceedings set out in the plaintiff's petition. And that he claimed to have and to hold the equitable title to said four by four arpents reserved by said Brazeau in his said deed to said Labeaume.

"The court further finds that there is no evidence that survey No. 3333, for Louis Labeaume or his legal representatives, or the patent thereon, were obtained by any fraud whatever.

"That the U. S. survey, No. 3332, for Joseph Brazeau's legal representatives, was made, and a patent was issued thereon, in 1852, as alleged in the answer of the defendants, for the Brazeau reservation, and that said survey and patent do not embrace any land lying north of said south ditch of Labeaume. That the conveyance made by Labeaume and Chambers in 1816, through whom the defendants claim title, was made upon good and valuable consideration, and without any notice of the equities now set up by the plaintiff. That said Louis Labeaume and those claiming under him have had possession of and have used, occupied and enjoyed the premises in

controversy from about 1798 to the time of the commencement of this suit.

"The court decides, upon the foregoing facts, that the plaintiff is not entitled to the relief sought by his bill, and that said petition should be dismissed at the cost of the plaintiff.

"C. B. LORD.

"Upon the finding as aforesaid, it is ordered and adjudged by the court that the plaintiff take nothing by this suit in this behalf; but that the defendants go hence without day, and recover of said plaintiff their costs and charges herein expended, and have execution therefor."

Defendants, further answering, say that said judgment and finding are final and conclusive between the parties, upon all the facts found and equities set up in the present petition; that no new facts or equities have been set up in this petition of 1862, except that a survey has been made of Esther's claim in 1859, and that Caleb Smith, Secretary of the Interior, in March, 1862, in violation of law, made a void decision, ordering a new survey and patent, more than ten years after a final decision of A. H. H. Stuart, a preceding Secretary of the Interior, had been made and recorded, upon the same subject matter and the same facts, between the same parties, and more than ten years after a patent was issued to Labeaume, and another patent to Brazeau, under the great seal and recorded. That the plaintiff in said former suit in equity took an appeal from said finding and judgment of the St. Louis Land Court to the Supreme Court of Missouri, where the judgment was affirmed in Magwire v. Tyler, 30 Mo. Rep. p. 203. That the plaintiff thereupon sued out a writ of error to the Supreme Court of the United States, where the judgment of the Supreme Court of Missouri was affirmed on the merits in the case of Magwire v. Tyler and others, 1 Black S. C. U. S. p. 195.

On the foregoing petition and answer this second suit for the same identical equities, between the same parties and privies, was heard before the Hon. Samuel Reber, Judge of the St. Louis Court of Common Pleas, and the proofs fully sustained all the allegations and denials of the answer, but the said Judge overruled all the former decisions in the case, and decreed as follows: (Rec. p. 54.)

The court finds that out of the claim presented to the Board of Commissioners by Labeaume in 1810, the four by four arpents claimed by plaintiff was confirmed to Joseph Brazeau and his legal representatives, and the court finds the issues for the plaintiff, and decrees that the said tract of four by four arpents be decreed to plaintiff, and that the title of defendants be devested and vested in the plaintiff and his heirs, and that plaintiff recover rents and profits, to be ascertained by a commissioner.

On the commissioner's report being made, the said Judge entered a final decree on the 21st of February, 1865 (Rec. p. 714), for nearly $20,000 rents and profits, although the land had not produced enough to pay the taxes, in consequence of the litigation.

Motions were duly made for a re-hearing and a new trial within four days after such decree, which were overruled, and exceptions were duly taken and signed in each instance, and the whole case stated in the answer is preserved in the bill of exceptions, and made part of the record. The case is brought to this court on appeal from the Court of Common Pleas by the defendants.

BRIEF.

Proposition I.

All the equities, claims, and pretences, now set up by the plaintiff, and many other valid defences not necessary to the defeat of plaintiff's champertous suit, were set up, insisted upon and adjudicated in a former suit in equity between the same parties and privies, and in regard to the same subject matter, and the plaintiff is forever concluded thereby.

The same identical facts were stated in the plaintiff's petition of 22d of August, 1855—on which the St. Louis Land Court, on the 22d of June, 1858, entered a finding of all the material facts, under the code of 1849, in favor of the defendants, and a final decree and judgment, not reversed or otherwise vacated—that are now stated in the second petition in equity for the same identical equitable grounds of relief, filed 18th September, 1862, and now pending before this Court, on appeal from the St. Louis Court of Common Pleas, Reber, Judge.

Plaintiff avers in this second suit that he has obtained a new survey and patent in June, 1862, for the Brazeau reservation, in the south-east corner of Labeaume's patent, and claims the same identical equitable relief asked in the former suit.

The patent to Labeaume was issued on the 25th day of March, 1852, on United States survey 3333, retracing the lines of Soulard's survey of 1799. The first patent to Brazeau was issued on the same day, on United States survey No. 3332, for four by four arpents, located at the foot of the Big mound, south of and adjoining Labeaume's patent, according to the calls in the deed of Brazeau to Labeaume referred to in the confirmation of 1810.

Point A. The finding of the facts, and the judgment and decree thereon in the former suit in equity, being full and specific as to all

the equities now set up, the judgment and decree in said former suit is conclusive upon the plaintiff as to all the matters determined or in controversy in said former suit. *Lessee of Parrish v. Ferris et als.*, 2 Black S. C. U. S. p. 608; 2 Story's Equity, § 1523 and note; Mitford's Eq. Pl. by Jeremy, pp. 236–8, states the rule fully and all the cases: "A decree or order dismissing a former bill for the same "matter may be pleaded in bar to a new bill, if the dismission was "upon hearing, and was not in terms directed to be without preju- "dice."—*Id.* p. 238. (See 2 Smith's Leading Cases, 424, and note to Dutchess of Kingston's case.)

POINT B. The former decree is conclusive of the claims, equities and pretensions of the plaintiff in the former suit in equity as to all the facts found by the court in that suit upon the hearing, that were material in the cause. *Perine v. Dunn*, 4 Johns. Ch. 142; *Neufie v. Neufie*, 7 Johns. Ch. 1; Story's Equity Pl. §793; Wilcox v. Badger, 6 Ohio, 406; French v. French, 8 Ohio, 214; Jenkins v. Eldridge, 3 Story C. C. 299; 2 Daniels Ch. Pr. 753–4; Holmes v. Remsen, 7 Johns. Ch. 286; 2 Daniels Ch. Pr. 1209 & 1199, and notes.

POINT C. The finding of the facts in the former suit under the code of 1849 operates as a special verdict upon all material issues in the pleadings, and are a part of the decree and judgment in the case, and conclude all parties as part of the record. (*Sutter* v. *Street*, 21 Mo. 157–9, 169; Freeland v. Eldridge, 19 Mo. 325; Bates v. Bower, 17 Mo. 550; Lewis v. Stafford, 4 Bibb, 320; Farrar v. Lyon, 19 Mo. 122; McLary v. Bowman, 3 Littell, 248; Walsh's case, *idem*, 142; Javins v. Harris, 20 Mo. 260; Voorhies v. Bank of U. S. 10 Pet. 449; *Lytle's case*, 22 Howard Sup. Ct. U. S. 193, 207; *Montford v. Hunt*, 3 Wash. C. C. R. 28.)

POINT D. The present petition asks relief upon the same identical equities, and upon the same facts adjudicated and determined in the former suit. Four leading facts are alleged in the former petition and in the present petition to establish plaintiff's equity, to-wit:

1st. That Soulard made the Spanish survey of the land asked for by Labeaume, in 1799, by mistake or design, so as to include the Brazeau reservation.

2d. That the confirmation of 1810 to Labeaume and to Brazeau were so made as to include the four by four arpents of Brazeau within the survey of Soulard for Labeaume.

3d. That the Brazeau reservation is properly to be located within the Soulard survey, from the relative position and location of the surrounding tracts.

4th. That defendants and their grantors claiming under Labeaume are not innocent purchasers; that they had notice of the reservation

being within the Soulard survey for Labeaume, and confederated to procure the patent to Labeaume for Brazeau's reservation.

On each of these allegations the court in the former suit found for the defendants, and decreed accordingly. On these same allegations in the present petition, the court (REBER, Judge) finds exactly the opposite, and they raise the same equity in favor of plaintiff that was determined against him in the former suit.

Plaintiff does not pretend to claim any equitable rights under the new patent of 1862, but insists upon the same four facts on which the finding was had in the former suit, and none other. The finding of these four facts in favor of the defendants, upon the issues made in the former suit, and the judgment and decree entered thereon are conclusive against the plaintiff in this suit, upon all equities claimed herein, for they are *res adjudicata*. See cases cited above under points A, B, and C, and 3 Dallas, 54; 1st Cond. R. 21; 4 Wheat. 217; 4 Cond. R. 426; 6 Wheat. 109; 1 Mason C. C. R. 515; 3 Cranch, 487.

PROPOSITION II.

All the equities set up in the former petition and in the present petition are thus disposed of as *res adjudicata*, and the plaintiff stands before the court upon the new patent of 1862 alone.

This second patent, under the same confirmation, if it were not void, raises only a legal title, and gives no equity to assail the Labeaume patent upon equities already adjudicated in the former suit. All the equities now relied upon having been adjudged against the plaintiff in the former suit, the plaintiff must stand upon the new patent alone, and has no remedy, except to sue in ejectment, and the new patent could not prevail against the old one at law.

Equity cannot aid the junior patentee claiming land covered by an elder patent unless the junior patentee can show beyond a reasonable doubt that the land covered by the elder patent is equitably and rightfully his property under the junior patent.

On this question, the plaintiff is concluded by the finding and judgment in the former suit, whereby it is adjudged that the Brazeau reservation did not lie within the elder patent to Labeaume, but south of it and adjoining it; that the Labeaume patent of 1852 and the survey by Soulard for Labeaume of 1799 do not embrace any portion of the land reserved by Joseph Brazeau in his deed to Louis Labeaume of the 9th of May, 1798; and that Chambers, through whom the defendants claim title, bought the Labeaume tract, in 1816, for a good and valuable consideration, and without any notice of the equities set up by the plaintiff, and that he and his grantees have held notorious and adverse possession for fifty years under said purchase.

This is the end of the controversy in this case, and the plaintiff has no equity or pretence of equity that has not been adjudicated in the former suit in favor of defendants; and the new patent, if not void, raises no new equity and does not authorize the assertion of equities already adjudicated and finally settled.

PROPOSITION III.

The new patent to Brazeau of 1862 is a nullity, and passes no title or claim of title to plaintiff, for the reason that the United States had previously granted the same land to Labeaume.

By the acts of Congress of 2d March, 1805, and 3d March, 1807, (Land Laws, vol. 1, pp. 122 & 153,) it is provided that the confirmation shall be made to the claimant, and that the patent certificate shall be made to the party confirmed for a tract of land to be designated in the patent certificate. (Sec. 6, Act of 1807, p. 154, Land Laws.) It is manifest, therefore, that but one patent can issue upon the same confirmation to the same person, and it must be for the parcel of land designated in the patent certificate.

The patent certificate to Brazeau declares that he is entitled to a patent for four arpents of land on the Mississippi, to be surveyed agreeably to a reserve made in a sale of Brazeau to Labeaume, recorded in Book C, p. 339, of the Recorder's office. This is the deed of the 9th of May, 1798, which fixes the reservation at "the foot of the mound," four arpents square, and south of the Labeaume tract surveyed by Soulard.

Congress alone has the power to dispose of the public lands, and the title can only pass to Brazeau in accordance with the said acts of Congress. (Const. U. S., art. iv, § 3; Wilcox v. Jackson, 13 Pet. 498; Landes v. Brant, 10 How. 348, 370; Menard v. Massey, 8 How. 293, 306–7; Berthold v. McDonald, 22 How. 334, 341; Burgess v. Gray, 16 How. 48, 65; Willott v. Sandford, 19 How. 79, 82; Strother v. Lucas, 12 Pet. 415; Haile v. Gaines, 22 How. 144, 160; Chouteau v. Eckhart, 2 How. 345; Lafayette's heirs v. Kenton, 18 How. 197; Doe v. Braden, 16 How. 635, 657; Foster v. Neilson, 2 Pet. 253, 307, 309; Garcia v. Lee, 12 Pet. 511, 520; Le Bois v. Brammell, 4 How. 449, 461; Mackey v. Dillon, 4 How. 400.)

The title passes to a claimant under the acts of Congress of 1805 and 1807, in the following manner:

1. The claimant files his claim with the Recorder of land titles for the tract of land, and presents his title papers for record.

2. He produces his evidence of possession prior to 1803.

3. Judgment of confirmation is entered of record, upon the claim and the evidence.

4. An United States survey of the confirmation is made, unless an authentic Spanish survey shall appear of record, as in case of Soulard's survey for Labeaume.

5. A patent certificate is issued on the Spanish survey or the United States survey.

6. The patent. (Secs. 1, 2, 3 & 4, Act of 1805; secs. 1, 2, 3, 4, 5, 6 & 7, Act of 1807.)

Under these acts of Congress there were two confirmations, one to Labeaume for the land included in Soulard's survey, and the other to Brazeau for the land at the foot of the mound, south of Soulard's survey; two patent certificates were issued, one to Labeaume and one to Brazeau, for two different tracts of land; two distinct surveys were made in 1852—one for Labeaume, retracing the authentic Spanish survey of 1799, and the other for Brazeau, locating his reservation at the foot of the Big mound according to the express calls of the deed of 1798; and on each of these surveys a patent issued to the parties respectively—one to Labeaume, in March, 1852, for the land in Soulard's survey of 1799, and the other to Brazeau, on the same day, for the land at the foot of the Big mound, south of Soulard's survey and stockade, where the respective parties had possessed for over half a century by a common boundary line, the one on the south and the other on the north of the stockade.

In the case of *West v. Cochran*, 17 How. 403, 413 & 414, the Supreme Court of the United States passed directly upon the question now before the court as to the effect of the confirmation to Brazeau before and after it was surveyed by the United States. The court held that, prior to the survey of 1852, "the title (of Brazeau) attached to no land, nor could a court of justice ascertain its boundaries, as this power was reserved to the executive branch of the federal government," &c. (See p. 416, 17 How.) In comparing the relative merits of the two confimations to Labeaume and to Brazeau (pp. 413 to 415), the Supreme Court of the United States held "*that the confirmation to Labeaume was according to the Soulard survey for Labeaume of* 1799" (p. 412); that the confirmation to Brazeau did not take effect until a survey and patent; that a survey was made and patent issued in 1852 for the Brazeau reservation "at the foot of the mound south of Labeaume's tract, which passed the title for that land to Brazeau in 1852, and that no other land could be claimed under that confirmation" (pp. 413–15).

The patent to Brazeau of 1852 was in evidence in *West v. Cochran*, and it was held to be effectual to pass a title to plaintiff for the land south of Labeaume's tract at the foot of the Big mound, and that no title vested in plaintiff for any other land under that confirmation. (*Id.* pp. 412 to 416.)

Two controlling propositions are established by the decision in *West v. Cochran:*

1. That the confirmation to Labeaume of 1810 was according to the recorded Spanish survey of Soulard for Labeaume of 1799. (*Id.* p. 412.)

2. That the confirmation to Brazeau was to be located by an United States survey; that it was so located in 1852, and that the title vested in plaintiff at that time, according to that location, for the four by four arpents of land at the foot of the Big mound. (*Id.* 412–13.)

The precise effect of the two patents was determined in that case. The confirmation to Labeaume was held to be for a tract of land defined by a recorded Spanish survey of 1799, and the title passed from the United States to Labeaume for that specific tract of land on the 26th of February, 1806, by relation of the patent to the day of claim. (*Landes v. Brant*, 10 Howard, 348, 370; *West v. Cochran*, 17 How. 412.)

The new patent, issued in violation of law in 1862, on the confirmation to Brazeau is for a portion of the same land confirmed to Labeaume in 1810, and is included within Soulard's survey for Labeaume of 1799 and the patent to Labeaume of 1852. This new patent is void, under the decision in *West v. Cochran*, 17 How. 412, 13, 14 & 17, for the reason that the court held that all the land within Soulard's survey of 1799 was granted by the United States to Labeaume by force of the confirmation of 1810, and the patent of of 1852 duly issued under the acts of 1805 and 1807.

The first grant being complete and perfect under said acts of Congress, the second grant for a portion of the same land is absolutely null and void, and can pass no title to the plaintiff, the United States having previously parted with the title in due form of law. See also *Magwire v. Tyler*, 1 Black, 198, S. C. U. S. The Supreme Court of Missouri, in *Mitchell v. Handfield*, 33 Mo. 438, gave the true construction to the confirmation to Labeaume, and to the decisions of *West v. Cochran* and *Magwire v. Tyler.*

In *Mitchell v. Handfield*, the court says: "In this case, the con-"firmation, being for a definite tract of land, took immediate effect, "and the subsequent proceedings by survey and patent relate to the "time of the inception of the proceedings before the Board for the "confirmation," 26th February, 1806.

"In some cases of confirmation, and for some purposes, the title "does not attach to any particular land until the survey is made; but in this case Labeaume's claim before the Board of Commissioners "was accompanied by a concession and a Spanish survey, and the

"confirmation was, therefore, of a definite tract of land, to which the "title immediately attached."

The court proceeds to declare the confirmation to have been made in 1810 to Labeaume, the claimant, according to the Soulard survey of 1799, and that the title relates back to the 26th of February, 1806, when Labeaume filed his claim for confirmation, and his title papers and Spanish survey, with the Recorder of land titles.

In *West v. Cochran*, 17 Howard, this same conclusion of law is stated; and further, that no title ever passed to Brazeau for any land under that confirmation until the survey by the United States in 1852. The title to all the land in Soulard's survey passed to Labeaume, as of the 26th of February, 1806, and the title to the Brazeau reservation vested, in February, 1852, for land south of Labeaume's patent, in Brazeau's representatives.

As between these two titles, the elder one must always prevail at law or in equity. (*West v. Cochran*, 17 How.; *Mackey v. Dillon*, 4 How.; *Le Bois v. Brammell*, 4 How.; *Magwire v. Tyler*, 1 Black; *Mitchell v. Handfield*, 33 Mo.; see also, *Cage v. Danks*, 13 Ann. La. Rep. 128.)

POINT A. The new patent of 1862 is void, for the further reason that the Secretary of the Interior had no power to annul a patent issued upon a final decision recorded more than ten years before in the same case by his predecessor in the same office.

The title to the land confirmed to Brazeau passed according to the provisions of the Acts of Congress of 1805 and 1807, above referred to, and the power to locate it was expressly reserved to the executive department, there being no Spanish survey of the land; and when that power was finally exercised, and the patent of 1852 to Brazeau was issued, the decision was final, and cannot be reviewed by any executive authority. (*West v. Cochran*, 17 How. 412–17; *Magwire* v. *Tyler*, 1 Black. 195; *Mitchell v. Handfield*, 33 Mo. 438; *Lytle v. Arkansas*, 9 How. 314; *Haile v. Gaines*, 22 How. 144; *Bernard v. Ashley*, 18 Howard, 43; *Cunningham v. Ashley*, 14 How. 377.)

In such a case, the title under the confirmation to Brazeau has absolutely passed by the patent, and neither the Commissioner of the General Land Office, nor the Secretary of the Interior, have any power to recall the patent, or annul the act of his predecessor, or devest the title. *Lott v. Prudhomme*, 3 Robinson, La. R. 293; *The United States v. Stone*, 2 Wallace, 535, hold: "But one officer of the Land Office is not competent to annul or cancel the act of his predecessor. This is a judicial act, and requires the judgment of a court."

"The decisions of a ministerial officer may be inquired into in a court of justice, and nowhere else. Congress itself is incompetent under the Constitution to destroy the vested right and title of a purchaser of the public lands." (*Jourdan v. Barrett*, 13 La. 43–4.)

"The United States having parted with its title by a patent legally issued, and upon surveys legally made by itself and approved by the proper department, can never impair the title so granted by any subsequent survey or grant. The United States in such case is no longer the owner." (*Cage v. Danks*, 13 Ann. La. R. 128; *West v. Cochran*, 17 How. 412; *Magwire v. Tyler*, 1 Black. 198, 199.)

POINT B. The plaintiff sold and conveyed the land within the said patent of 1852, in favor of Brazeau's representatives, to Louis V. Bogy by deed, and is thereby estopped from claiming the land under the same confirmation in another place. (See deed of John Magwire to Louis V. Bogy, Rec. p. .)

Other persons claiming the Brazeau reservation through Pierre Chouteau, under the patent of 1852, to Brazeau, contested the right of Louis V. Bogy to hold the land under the title derived from Magwire, and the Supreme Court of Missouri held in *L. G. Picot v. Bogy, Page & Benoist*, 26 Mo. 422, that the title to the Brazeau reservation was vested in the assignees of Strother, grantee of Chouteau, south of Labeaume's stockade inclosure, at the foot of the Big mound; and that the land in Pierre Chouteau's grant did not extend north of the north foot of the Big mound, as patented by the United States to Pierre Chouteau. This decision holds that the only title ever granted by the United States for the land between the Big mound and Labeaume's stockade inclosure, was under the Brazeau reservation for sixteen arpents of land.

To this same effect the Supreme Court of Missouri has decided in *Magwire v. Vice*, 20 Mo. 429; *Magwire v. Tyler*, 25 Mo., and *Magwire v. Tyler*, 30 Mo.

The Supreme Court of the United States has held, upon this identical title, to the same effect in the cases of *West v. Cochran*, 17 How. 412–17, and *Magwire v. Tyler*, 1 Black. 198; see also the cases of *Burgess v. Gray*, 16 How. 48, 65, and *Stanford v. Taylor*, 18 Howard.

POINT C. The title to the sixteen arpents of land at the foot of the Big mound, included in the patent to Brazeau of 1852, must be devested before the court can locate the same confirmation within the Soulard survey. Two titles to two different tracts of land cannot emanate under the same confirmation.

The plaintiff has not made the owners of the Brazeau patent of 1852 parties to this action so as to devest their titles, because Mr. Bogy, the grantee of plaintiff for the land south of the Labeaume

tract, is holding that title under the plaintiff and under the Brazeau patent, while his grantor is waging this champertous suit for other land claimed to be covered by the same confirmation in another place and within the Labeaume patent.

In *Picot v. Bogy et al.*, 26 Mo. 422, the assignees of Strother, under Chouteau, claim the land covered by the Brazeau patent of 1852, at the foot of the Big mound, and the Supreme Court decided that Strother's assignees own the land there, under the Brazeau patent; and in this case the plaintiff, as assignee of Strother's assignees, suing for their benefit under a champertous agreement, after conveying his claim to the reservation south of the Soulard survey, has obtained a decree from REBER, Judge, for the land within the Labeaume patent, without devesting the Brazeau title vested under the patent of 1852; and without requiring any of the persons holding under that patent to be made parties to this suit.

Stripped of all disguises, this decree vests Labeaume's title in Brazeau's assignees, and leaves the Brazeau title in his assignees also, so that Brazeau's assignees, who repudiate the location of the reservation north of Labeaume's stockade in order that they may hold the same reservation south of the stockade, are allowed to recover the same reservation north, and hold both, under the same confirmation.

This legal outrage has been excused by the plaintiff under the pretence that, after he had sold the reservation to Bogy, south of the stockade, he had refused to receive the Brazeau patent of 1852 from the Recorder of Land Titles. It has been boldly urged that Magwire's refusal to receive the patent prevented it from taking effect. This gross proposition is directly controverted by all the cases. *Picot v. Bogy*, 26 Mo.; *West v. Cochran*, 17 How.; *Magwire v. Tyler*, 30 Mo., and 1 Black; and *Mitchell v. Handfield*, 33 Mo. All these cases were decided after Magwire had refused to receive the Brazeau patent of 1852, and the title was held to pass, and Maguire's refusal to take the patent was never regarded as having any effect upon the title. The fact is, that after the plaintiff conveyed the land south of Labeaume, at the foot of the mound, to Bogy, he has had no interest, title or claim to the Brazeau reservation.

POINT D. The only title papers from Joseph Brazeau for the reservation are the deed from Brazeau to Labeaume of 1798, creating the reservation, and the deed of Brazeau to Chouteau of 1816, conveying the reservation (Rec. p.).

Under these deeds the Brazeau reservation cannot be located at any other place than at the foot of the Big mound, where the United States survey and patent of 1852 fix it. By the deed of 1798 Brazeau conveyed the whole of his grant of four by twenty arpents of land

to Labeaume, and reserved for himself "four arpents of land, to be taken at the foot of the mound, in the south part of said land." Brazeau had a limekiln on this reservation, about two arpents south of Labeaume's stockade, and Brazeau had cultivated up to the foot of the mound.

The foot of the mound is as well defined as the north wall of the Court House in St. Louis; and the mound was four arpents and twenty French feet south of Labeaume's stockade. The title to the whole of the land embraced within Brazeau's concession passed to Labeaume by the deed of Brazeau to him, and the only land reserved was *four arpents at the foot of the mound.* This deed is to be construed most strongly against the grantor, and the rule is well settled that everything passes by a deed which is described, excepting only that which is expressly reserved. (Cruise's Dig. Real Prop. by Greenleaf, vol. 4, pp. 271–3; Hilliard on Real Prop., vol. 2, p. 352, secs. 134–7.)

The decisions of the Supreme Court of the United States in *West v. Cochran* and *Magwire v. Tyler*, on this same title, adjudge this reservation to be located at the foot of the mound. In *Magwire v. Tyler*, 1 Black, p. 199, the Land Court found as a fact that the Brazeau reservation was located south of Labeaume's patent, at the foot of the Big mound, and the Supreme Court of the United States so expressly declares the fact to be, on pages 198 and 199. A review of the Brazeau deed, of the Labeaume petition, of Soulard's survey, and of the location of the Brazeau reservation, is made, and the Court says:

"The Board ordered that Labeaume's concession should be sur-
"veyed in conformity to the order of survey made by the Lieutenant
"Governor, and that Brazeau's tract of sixteen arpents should be
"surveyed agreeably to a reserve made in a sale from Joseph Bra-
"zeau to Louis Labeaume. This survey was to be made conform-
"ably to a reservation in the deed, and *that reservation was at the "foot of the mound.*"

In the case of *Magwire v. Vice*, 20 Mo., the question of location was left to the jury, and the jury found for the defendant.

An examination of the ground by any competent surveyor will show that the reservation described in the deed of 1798 is only to be located as it was by the patent of 1852. (See testimony of Wm. H. Cozzens, Wm. Milburn, and others.)

The deed of Joseph Brazeau to Pierre Chouteau, of 1816, describes the Brazeau reservation still more emphatically, as land lying at the foot of the Big mound. Chouteau and Labeaume had been possessing by a common boundary "the stockade inclosure" for seventeen years prior to this deed, which was made to prove a verbal sale of Brazeau to Chouteau prior to the 9th of May, 1798,

and in this deed of 1816 it is declared that Mr. Labeaume had complied with the terms and conditions of the deed from Brazeau to Labeaume.

Pierre Chouteau, in 1816, was the owner of the Brazeau reservation, of the Esther concession, and of a grant to himself which included the reservation; and after the patent issued to him in 1824 he filed a protest with the Commissioner of the General Land Office in May, 1826, stating, in substance, that the Brazeau reservation was south of Labeaume's tract, and he objected to a patent issuing on a New Madrid location, made to extend from Labeaume's south line or stockade to Cherry street, on the ground "that it covered the "whole of a small tract of sixteen arpents which I have purchased "from a Mr. Joseph Brazeau, to whom it had been confirmed by "the Board of Commissioners."

Pierre Chouteau and Louis Labeaume had possessed their land by the common stockade boundary from 1799 to 1816, and from 1816 to 1826 Chouteau and his grantees, and Chambers, Christy & Wright, had possessed by the same boundary line.

The deed of Brazeau to Chouteau of 1816 does not convey any land within Soulard's survey for Labeaume, and the plaintiff has not produced any other title paper from Brazeau; so that if there were any equity outstanding in favor of Brazeau for any land not described in this deed, the plaintiff has not shown any transfer of it from Brazeau. If Brazeau had acquired any land in Soulard's survey by the confirmation of 1810, he has never conveyed it to any one, and plaintiff has no title to it.

Proposition IV.

The assent of the United States to the passage of the title for the whole of Soulard's survey is evidenced by the confirmation of 1810 and by the patent of 1852 to Louis Labeaume, whose actual possession in 1800 and in 1803 was proved up before the Board of Commissioners, under a claim filed by Labeaume on 26th February, 1806. This evidence, by the patent issued in conformity with the acts of 1805 & 1807, is conclusive upon all parties in all courts, as against all other inchoate claims for title to the same land. All these claims in favor of Brazeau or other persons became extinguished by the issue of the patent to Labeaume and have no standing in court, and no other person than the grantee, under the said acts of Congress, can be held by a court of justice to be entitled to the land. (*West v. Cochran*, 17 How. 413, 417; *LeBois v. Brammell*, 4 How. 449, 461; *Landes v. Brant*, 10 How. 348, 370; *Mogwire v. Tyler*, 1 Black. 195, 199; *Haile v. Gaines*, 22 How. 144, 160; *Lafayette's heirs v. Kenton*, 18 How. 197; *Bissell v. Penrose*, 8 How. 317; *Chouteau v.*

Eckhart, 2 How. 344; *Strother v. Lucas*, 12 Peters, 410; *Bissell v Penrose*, 8 How. 344; *Menard v. Massey*, 8 How. 306.)

PROPOSITION V.

The inchoate claim of Brazeau never had any standing in court as against the Labeaume confirmation under the Soulard survey.

Brazeau had no legal confirmation under the acts of Congress of 1805, '6, or '7, under which the confirmation to him purports to have been made, for the reason that no notice of his claim was filed by him, according to the requirements of said acts of Congress, so as to give the Board of Commissioners jurisdiction of his claim. The Board of Commissioners in Missouri possessed only such powers as were conferred upon it by acts of Congress of 2d of March, 1805, 25th February, 1806, and 3d March, 1807. The first of these acts created the board, prescribed its duties and jurisdiction, and the others only extended that jurisdiction to certain classes of cases that might be filed during the time as extended. By the 4th section of the act of 1805, 2d vol. L. & B. ed., p. 326, each claimant "*shall, before the* "*1st day of March*, 1806, *deliver to the Register or Recorder of land* "*titles within whose district the land may be, a notice in writing*, "*stating the nature and extent of his claim, together with a plat of* "*the tract claimed; and shall deliver to the Register or Recorder, for* "*the purpose of having the same recorded, every grant, order of sur-* "*vey, deed, conveyance, or other written evidence of his claim*," &c.

This notice of claim had to be filed, together with the documentary evidence of title, before the 1st of March, 1806, which time was afterwards extended, as to certain claims, until the 1st day of July, 1808; and it was further enacted that "if any person should fail to deliver such notice, or cause to be recorded such written evidence of his claim 'all his rights' under the act should be void and forever barred," and that no incomplete grants, warrants, deeds, &c., which were not so recorded should ever be admitted as evidence in any Court of the United States, against any grant derived from the United States.

This grant to Brazeau was incomplete. The Board of Commissioners was a court of special and limited jurisdiction, not acting under a common law jurisdiction, but in pursuance of a statute of the United States.

After the claims were thus filed and recorded, the board was authorized to act upon them, and not before. The fifth section of the act of 1805 confers the only power possessed by the board, in the following words: "To decide in a summary way, according to justice and equity, on all claims filed with the Register or Recorder in conformity with the provisions of this act," &c.

As to complete French or Spanish grants, the board had no power, but merely ascertained that they were such, they being perfect titles needing no confirmation. In all incomplete grants, warrants, or orders of survey, it was required by these acts of Congress that the party claiming the land, and asking a confirmation thereof, should have had actual possession thereof on the 1st of October, 1800, or on the 20th December, 1803; and the confirmation was made for such possession *to be surveyed*, unless there was already a recorded survey under the Spanish Government.

Section 1 of Act of 2d March, 1805, p. 325, 2 L. & B., required possession under a registered warrant or order of survey on the 1st of October, 1800, and actual inhabitation and cultivation.

Section 2, of the same act, extends the provisions of that act to all persons actually in possession of land under any settlement right on the 20th December, 1803.

Section 7 of the Act of 3d March, 1807, requires surveys to be made by the United States surveyor, if an authentic Spanish one has not been made, or shall not appear of record, &c.

There was a recorded Spanish survey of the Labeaume tract, recorded the 15th of April, 1799, as appears from the Register d'Arpentage of Upper Louisiana.

The power of the Board of Commissioners did not extend to all land in Louisiana or Missouri, nor could the board confirm lands except in accordance with law. 2 Howard, 374; *U. S. v. Percheman*, 7 Peters, 85, 90, and cases cited above. Congress did not create this board for the purpose of making donations of land, but merely vested in it power to act on claims to land under incomplete grants, warrants of survey, and settlement rights, originating under the Spanish Government, which were actually presented, filed and recorded, and accompanied by a written statement of the claim, signed by the claimant, showing its nature and extent, and to be prosecuted afterwards by producing before the board evidence of actual possession in October, 1800, or on the 20th December, 1803, or for ten years prior thereto. The board had no more power to confirm land not claimed before it, according to the requirements of the statute, than a court of justice would have to enter up a judgment without any party before the court, without a writ of appearance. Such a judgment would be a nullity; and so an act of the board, confirming land to a man who is not a claimant, who has not filed any notice, or made any proof of possession in accordance with the statute, is a mere nullity.

The jurisdiction that might be presumed in favor of the validity of judgments rendered in a court of common law jurisdiction, will not be presumed in favor of special statutory courts. A court con-

stituted as this Board of Commissioners was, and created for a special purpose, has no common law intendment in favor of its jurisdiction, but the facts necessary to show its jurisdiction under the acts of Congress must appear upon the record of the judgment of the board rendered by the board in the particular case.

In *Wilcox v. Jackson*, (13 Peters, 449,) the question was presented whether a preëmption claim and Register's certificate to the plaintiff was a sufficient foundation for an action of ejectment, under the statute of Illinois, to recover lands so entered, which were reserved from sale by order of the President of the United States. It was held: "That if a court acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void. Assuming that the decision of the Register and Receiver, in the absence of fraud, would be conclusive as to the facts of the applicant then being in possession, and his cultivation during the preceding year, because these questions are directly submitted to them; yet if they undertake to grant preëmptions in land, in which the law declares they shall not be granted, then they are acting upon a subject matter clearly not within their jurisdiction."

In the case of Chouteau v. Eckhart, 2 Howard, 374, this court held that "the Board of Commissioners had no capacity to grant, but only to ascertain facts, and report their opinions," and that "their power to examine did not extend to every description of claim."

These principles apply with peculiar force to the case at bar. Brazeau failed to deliver any notice of claim, or to do any act required by law, in order to procure a confirmation or give the board jurisdiction of his claim. The reason why he failed to do so is apparent from the record in this cause; for Brazeau, prior to 9th of May, 1798, sold all his interest in the reservation, by a verbal sale, to Pierre Chouteau, (see the deed from Brazeau to Chouteau of 1816,) and this verbal sale passed Brazeau's title and claim under the Spanish law to Chouteau. (10 Missouri Rep. 260; 4 Martin, N. S., 567; 7 Martin, N. S., 315; 3 Louisiana, 114.) Chouteau had included the reservation within his extended grant, and located it according to the United States survey and patent. (See protest of P. Chouteau of May, 1826.)

Labeaume duly presented his notice to the Recorder, claiming, according to his Spanish survey, all the land within it, and filed the documentary evidence of his title with said Spanish survey, and had them duly recorded, thus complying with the law, and placing his claim before the board for the tract of land which was confirmed to him as defined by the Spanish survey of Soulard.

In the case of Strothers v. Lucas, 6 Peters, 771, 772, it was held

that notice of the nature and extent of the claim must be filed, together with all the written evidence of the claim, and all *persons neglecting to do so are forever barred.* See also Strother v. Lucas, 12 Peters, 453–4 and 458; and Bissell v. Penrose, 8 How. S. Ct. U. S. 333, 338.

Brazeau never filed any claim before the board, and he had no claim for this land to file.

How could the board, acting on the claim of Labeaume lawfully before it, for a tract of land described by specific metes and bounds, with a recorded Spanish survey as evidence of the grant, and proof of possession by him as head of a family, confirm the claim to Labaume, and then proceed and confirm to Brazeau the reservation in which he had no interest, in possession or reversion, and for which he had filed no claim, but which was actually claimed as a part of another grant by Pierre Chouteau? The confirmation is to the claimant. (Landes v. Perkins, 12 Miss. 255–6; Strother v. Lucas, 12 Peters, 458; Bissell v. Penrose, 8 Howard, 338; see also 14 Miss. 482.) The question here is as to the jurisdiction of the board to confirm land to Brazeau not owned, or claimed, or possessed by him, under proceedings by Labeaume on a claim for other land, and it seems very clear that the board had no jurisdiction over the non-claim, which was illegally confirmed to Brazeau, and that nothing could pass to Brazeau by the confirmation. It is an anomalous case in which the board not only attempted to confirm land to a man who did not own it, or claim it, or possess it, but this act was done in violation of the statute in 1810, when all claim by Brazeau was forever barred, and he was prohibited from exhibiting any such claim as any evidence of title thereto before any court.

It is said on the part of the plaintiff that the only parties to the confirmation are the United States and Brazeau, and that Labeaume has no right to question the regularity of the proceedings or the jurisdiction of the board, collaterally, in this action. If Brazeau's representatives only claimed this land when the United States had located it in accordance with the patent, it would not interfere with Labeaume's tract, and the defendant could not object that the Government had given to Brazeau sixteen arpents of land without any lawful right to do so: it would then be a question between the grantor and grantee, and a third person could not object to a grant of land being made in which he had no interest. But the case presented is one in which the representatives of Brazeau set up a confirmation, within Labeaume's patent, for land that Brazeau did not own or claim. It is no longer a question between the Government and Brazeau, but one between Brazeau and Labeaume; and Labeaume's representatives have a clear right to insist that such confirmation

cannot affect the title to any land embraced within the United States survey and patent to Labeaume; that, as to such land, it is null and void; that the board had no jurisdiction over it, and that plaintiff cannot set up any title under it.—*West v. Cochran*, 17 How. 413, 417.

It is conclusively proved in this case that Labeaume possessed the land embraced within Soulard's survey on the 1st of October, 1800, and on the 20th December, 1803; that said survey was duly recorded in April, 1799, and that it was the concession, in fact, to Labeaume; that the United States survey and patent are for the same land embraced within Soulard's survey; that the only concession to Labeaume was the order of survey, and the said survey of Soulard; and that it was Soulard's survey that was claimed by Labeaume, and confirmed by the board (*Mitchell v. Handfield*, 33 Mo.); therefore, Labeaume's representatives have a vested right, under the confirmation, to the land within the Soulard survey, which is the same land included within the Labeaume patent, and the patent relates back (*Landes v. Brant*, 10 How.; *Crowly v. Wallace*, 12 Mo. 145) to the confirmation and to the notice of claim in February, 1806, so as to override the title of Brazeau's representatives to any land within the Soulard survey. (*West v. Cochran*, 17 How. 413.)

The question is distinctly presented between these two confirmations, as to *which shall prevail for the land embraced within the Soulard survey*. Brazeau has no confirmation under any law of the United States for the land; he is expressly barred by law from exhibiting any evidence of his grant or deed in any court against the Labeaume confirmation; he did not possess the land in October, 1800, or in December, 1803, as required by the act; he never had any survey for it; he has no patent for it, and he did not own or claim to own the land.

Labeaume has a complete confirmation for this land under the laws in force; he possessed it in October, 1800, and in December, 1803, he had a recorded Spanish survey of it; he has an United States patent and survey for the whole tract. All the title that the United States had in this land on the 26th of February, 1806, the date of Labeaume's claim, has been vested in Labeaume and his legal representatives by the patent. (Green v. Liter et al., 8 Cranch, 229; Landes v. Brant, 10 Howard, 373–4; West v. Cochran.)

The confirmation under which plaintiff claims cannot prevail against Labeaume's confirmation alone, if it were not supported, as it is, by the patent, which is the ultimate and conclusive evidence of title. (Landes v. Brant, 10 Howard; Burgess v. Gray et al., 16 Howard; Magwire v. Tyler, 1 Black.; West v. Cochran, 17 How.) It cannot avail the plaintiff to say that the confirmation to Brazeau

was for land within the Soulard survey for Labeaume. The board had no jurisdiction over the location of any grant; its powers were limited by the acts of Congress to the examination of claims filed, and the taking of testimony of possession, and the reporting of an opinion for or against the confirmation. So far as the confirmation is claimed to locate Brazeau's reservation, the board had no power whatever. The plaintiff is compelled to insist that, upon the possession by Labeaume of the land within the Soulard survey, the board had power to locate the reservation within that survey, without any claim or any evidence of right or possession. The case of Wilcox v. Jackson, 13 Peters, 511, is directly in point to show that the board had no such jurisdiction. (See also Chouteau v. Eckhart, 2 Howard, above cited; Soulard v. Clark, 19 Mo. 577.)

If the confirmation to Brazeau be not void for want of notice by the claimant, yet it cannot operate as a grant of the premises in controversy by force of the acts of 1805 & 1807, for the reason that Brazeau had no estate, no claim, and no possession.

Confirmation at common law was an appropriation of or assent to an estate already created, by which the confirmor strengthens and makes it valid. (Gilbert's Ten. 75.)

Lord Coke defines it to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable. (2 Coke's 1 Inst. 516, or 295 *b*.)

The Act of 1805, section 1, authorizes confirmations to inhabitants who cultivated and possessed tracts of land on the 1st day of October, 1800. By section 2, the head of a family, twenty-one years of age, who had made an actual settlement on a tract of land, with the permission of the proper officer, &c., and who actually inhabited and cultivated the tract on the 20th December, 1803, might be confirmed.

The Act of 1807 authorizes, by section 2, a confirmation to be made to any resident of Orleans or Louisiana who had been in possession of a tract of land ten consecutive years prior to the 20th day of December, 1803.

Brazeau had no possession to support a confirmation under these acts of Congress, and he had no estate upon which the confirmation could operate.

He had sold all his interest in the reservation to Pierre Chouteau before 1798, and the court below, in the former case of Magwire v. Tyler, (30 Mo.) has found as a fact that Labeaume and his grantees have been in possession of the premises within the confirmation and patent to him from 1798 to this day. (Magwire v. Tyler, 1 Black U. S. C. R.)

PROPOSITION VI.

The plaintiff is barred from recovering this land, by estoppel. A boundary line was established between Labeaume, under whom defendants claim title, and Chouteau, under whom plaintiff claims title, in the year 1799, and it has been recognized for more than twenty years before any suit for this land was brought by him or his representatives.

This vests the title according to the line so established, by force of the possession of Labeaume and of Chouteau, in accordance with that line. (See *Taylor & Mason v. Zepp*, 14 Mo. Rep. 482; *Lindell v. McLaughlin*, 30 Mo. ——; *Jackson v. McConnell*, 19 Wend. 175.)

The title of Labeaume vested in 1806, and the estoppel takes effect from that date, and bars the claimants under Chouteau.

PROPOSITION VII.

The plaintiff is barred by the statute of limitations and by the lapse of time.

The title having passed from the United States to Louis Labeaume on the 26th February, 1806, and the said Labeaume and the defendants claiming under him having been in possession of the land from 1806 to 1862, when this suit was brought, the plaintiff cannot recover.

1. The title passed to Labeaume on the 26th day of February, 1806. (*West v. Cochran*, 17 How. 413; *Landes v. Brant*, 10 How.; *Mitchell v. Handfield*, 33 Mo.)

2. The possession of Labeaume and his grantees was open, notorious, and adverse to all persons, from 1806 until 1862. See the testimony of Wm. H. Cozzens, Wm. Milburn, Wm. Waddingham, Jerusha Walker, Cyrus G. Hoyt, Edwin Tanner, Jacques Labbé, Antoine Smith, John B. Hortez, Phineas Bartlett, and the letters of Lapsley and Chambers, Rec. pp.

The commencement of various suits by the plaintiff for this land does not prevent the running of the statute of limitations. Each suit commenced by plaintiff before or since 1851, has either been dismissed, or the plaintiff has suffered a verdict against him.

The 3d sec. of the 3d Art. of the statute entitled Limitations, in the Codes of 1835, 1845, and 1855, does not prevent the running of the statute, unless the plaintiff has commenced an action within the time limited and suffered a nonsuit; or, after a verdict for him, the judgment has been arrested; or, after a judgment for him, the same be reversed on appeal or writ of error, and the plaintiff has brought a new action within one year after such nonsuit suffered,

or such judgment arrested or reversed. (R. C. 1845, p. 718; 1855, p. 1051.)

From the beginning of this litigation, the plaintiff has never obtained a verdict or a judgment in his favor, until REBER, Judge, decreed the land of the defendants, possessed by them for sixty-two years, to belong to the plaintiff in this suit, commenced in September, 1862.

The ejectment suits of 1851, by the plaintiff against defendants, terminated in a verdict and judgment for defendants, in the case of *Magwire v. Vice*, 20 Mo., when the plaintiff dismissed the other cases, and sued in the federal court.

In the suit in ejectment of *West v. Cochran*, 17 How. 413, for a single lot of ground, the defendant had a verdict and judgment in his favor in the C. C. U. S.

In the suit in equity of *Magwire v. Tyler*, 30 Mo. and 1 Black, the defendants had a decree in their favor on the merits of the title, which was finally affirmed in the Supreme Court of the United States.

There is, therefore, no saving clause in the statute of limitations in favor of plaintiff. All the suits preceding this one do not in any way prevent the running of the statute of limitations.

Wm. Chambers bought the land, in 1816, of Labeaume, for seven thousand four hundred and sixty dollars, and took a deed for the whole of the Soulard survey, and he conveyed two undivided third parts thereof to Wm. Christy and Thomas Wright in the same year, so that Chambers, Christy & Wright became tenants in common in the whole tract; and one or more of them lived on the tract from 1816 until their deaths, in 1837, 1840, and 1848, and their representatives have held possession ever since. The Land Court found as a fact, in the former case, "THAT LOUIS LABEAUME, AND THOSE CLAIMING UNDER HIM, HAVE USED, OCCUPIED AND ENJOYED THE PREMISES IN CONTROVERSY FROM ABOUT 1798 TO THE TIME OF THE COMMENCEMENT OF THIS SUIT."

The evidence in the case is conclusive upon this question.

The possession for ten years prior to the 18th of September, 1862, vests a perfect title in the defendants to the land. (*Biddle v. Mellon*, 13 Mo. 335; *Blair v. Smith*, 16 Mo. 273; *McNair v. Lot*, 34 Mo. 300; *Bollinger v. Chouteau*, 20 Mo. 89; *Keeton v. Keeton*, 20 Mo. 530; Lucas Act of 1847.)

In *McNair v. Lot*, 34 Mo. ——, a mortgagor filed his bill to redeem a mortgage on which there had been a payment in 1836, within twenty years prior to the suit. Innocent purchasers had intervened between the date of the mortgage and the payment of it,

and the possession by such purchasers for twenty years before the commencement of the suit was held to bar the suit of plaintiff for redemption, and the court further held that the bar of a suit in equity, by the lapse of time, is as effectual as the bar of a suit at law by the statute of limitations.

The case of McNair v. Lot is directly in point in this case. The equity set up by plaintiff is that Soulard's survey included Brazeau's reservation, and that the confirmation of 1810 also included it. But this equity originated between *Labeaume and Brazeau*, and no notice of it appears on the title papers or records, and Chambers, Christy & Wright were innocent purchasers in 1816 of all the land in Soulard's survey by full warranty deeds, and their possession for twenty years, after the 17th December, 1818, of the land under said deeds vested in them a complete title according to the ambit of Soulard's survey, which is identical with the survey and patent to Labeaume of 1852.

Wm. Chambers, Wm. Christy and Thomas Wright were innocent purchasers, without notice of any equities in favor of Brazeau, and for full value, before any United States survey had been made of the confirmation to Labeaume. (See deeds from Labeaume to Chambers, and from Chambers to Christy & Wright.) In such a case the purchasers are protected against all pre-existing equities. (*Le Neve v. Le Neve*, 2 W. & T. Lead. Cases, 116, 120, Am. Ed.; *Boggs v. Varner*, 6 W. & S. 469; *French v. Loyal Co.* 5 Leigh. 627; *Crockett v. Magwire*, 10 Mo. 34; *Lodge v. Simonton*, 2 Penn. 439; *White v. Carpenter*, 2 Paige, 217–253; *Connecticut v. Bradish*, 14 Mass. 291; *Goundie v. Northampton Water Co.*, 7 Barr. 233, and *McNair v. Lot*, 34 Mo. 300–2.)

POINT A. The innocent purchasers for full value came into possession in 1816, and after they and their representatives have held for forty-six years, under warranty deeds conveying the land by a well known ambit, the plaintiff has filed this bill to correct the alleged mistake in Soulard's survey of 1799, and in the confirmation of 1810.

The plaintiff is barred of this relief by the great lapse of time. The land then was of no value; now it is worth $500,000. After more than half a century from the settlement of the original locations by the Spanish government, with the consent of Chouteau and Labeaume, in the presence of Soulard, in 1799 and in 1803, on the ground; and after coterminous possessions by a boundary line for fifty years, and an adverse possession by innocent purchasers for forty-six years, it is too late to correct the alleged mistakes of 1799 and 1810. (*Piatt v. Vattier et al.*, 9 Peters, 416; *Smith v. Clay*, 3

Brown's Chy. Rep. 640; *Kane v. Bloodgood*, 7 Johnson's Ch. Rep. 93; *Decouch v. Saratier*, 3 John. Ch. Rep. 190; *Prevost v. Gratz*, 6 Wheat. 481; *Hughes v. Edwards*, 9 Wheat. 489; *Wilson v. Matthews*, 3 Peters, 44; and the late case of *Badger v. Badger*, 2 Wallace, S. C. U. S., p. 87.)

All the witnesses who could speak of the transactions in 1799, or in 1810, are dead, and it is not competent for the court to pass upon transactions of the last century. (*Johnson v. Johnson*, 5 Ala. 97, N. S.; *Atkinson v. Robinson*, 9 Lee, 396; *Pye v. Jenkins*, 12 Peters, 254; *Bowman v. Wattle*, 1 Howard, 193; 2 Sch. & Lefroy, 636; 17 Vesey, 87; *Mitchell v. Thompson*, 1 McLean, 106; *Crane v. Prather*, 4 J. J. Marsh, 77; *Picot v. Page*, 26 Mo. 413; 4 Yerger, 97; 6 Yerger, 73.)

Where an action at law would be barred, relief will be refused in equity. (*Miller v. McIntyre*, 6 Peters, 67; *Hunt v. Wickliffe*, 2 Peters, 212: *Peyton v. Smith*, 5 Peters, 493–4.)

PROPOSITION VIII.

The plaintiff is not the representative of Chouteau for this Brazeau reservation, under the decision of the Supreme Court of this State in the case of *Picot v. Page*, 26 Mo. 399. (See also Mr. Justice Scott's opinion in *Magwire's case*, 25 Mo. 498–9.)

In conclusion, defendants ask that the judgment and decree of the court below be reversed and a decree ordered to be entered up for the defendants, so as to end this most vexatious and unfounded litigation, and enable the defendants to enjoy the land which they and their grantors have honestly owned for over half a century.

St. Louis, March 16, 1867.

BRITTON A. HILL,
of Counsel for Defendants.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1868.

MAGUIRE vs. TYLER ET ALS.

BRIEF OF J. R. SHEPLEY, FOR APPELLEES.

IN THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1868.

MAGWIRE
vs.
TYLER *et al.*

BRIEF FOR APPELLEES.

J. R. Shepley, for appellees, submits the following points and authorities:

I. The confirmation to Joseph Brazeau is not a confirmation of land within the limits of the tract of land claimed by Louis Labeaume before the Board of Commissioners as being entitled to have confirmed to him.

As this was the ground and the only ground for the decree in this case, as given by the Court of Common Pleas, it is worthy of consideration; and, in considering it, it is to be observed—

1st. That this same point has been presented and dwelt upon at great length by the counsel of Magwire at almost every, if not every, trial upon this title which has taken place in the Supreme Court of the State, and the Supreme Court of the United States. At the hearing of the case of Magwire vs. Vice, 20 Mo. 429, in the Supreme Court of the State, one of the plaintiff's counsel made this the most prominent point of his argument, and elaborated it at great length, and it has been presented with more or less prominence in every argument on the part of plaintiff

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ever since, both in our Supreme Court and the Supreme Court of the United States.

Yet, though it has for so long a time been presented with such prominence, it has not received the slightest consideration by any court that has had these titles under its consideration. No intimation has ever been given, even by judges who dissented, that such a construction could for a moment be entertained.

2d. The facts connected with the confirmation are all against such a view, for—

(*a*) After (in 1798) Labeaume had purchased of Brazeau the northern 16 by 4 arpents of the Brazeau tract of four by twenty arpents, he applied to the Lieutenant Governor in 1799 "for a grant of 360 arpents, including the land which he, the petitioner, bought of Mr. Brazeau"—that is, 20 arpents in depth from the Mississippi, in ascending the Rocky Branch, W¼ 5 by 16 arpents in front along the Mississippi, to be taken from the descent of road into the creek, which is the same front of the petitioner's land—"the angle formed by the perpendicular from the road to the river by the creek and by the river shall complete or about the tract asked for."

Therefore, the land purchased by Labeaume of Brazeau was included within the limits of the tract asked for by Labeaume, "only that and nothing more." The land asked for has a front on the Mississippi river of 16 arpents, and runs back 20 arpents, with a triangular or angular space on the river at its northern extremity. It is a parallelogram, with an attachment at its northeast corner of a triangular shape—the south line of which, wherever it is located, must of necessity be a straight line from the river west of 20 arpents in length. This tract thus asked for was granted in February, 1799.

(*b*) In March, 1799, Soulard surveyed the tract conceded, and found that it contained in its superficies 374 arpents, and made and certified a plat of the same on the 10th of April, 1799. It is this survey retraced which has been surveyed by the United States as United States survey No. 3363, and upon which a patent issued in 1852 to Louis Labeaume and his legal representatives. This survey follows the petition of Labeaume, and

its southern boundary is a straight line from the river to the western boundary of the tract.

It admits of no tract of 4 arpents, or of 4 by 4 arpents, taken out of its southeast corner.

(*c*) These were the title papers filed by Labeaume before the Commissioners as forming his claim; and among other claims before the Board, Labeaume describes it shortly in this manner: "Louis Labaume, 374 arpents of land, conceded in part to Jos. Brazeau the 20th June, 1794, and the other part to Louis Labeaume the 15th February, 1799, settled and cultivated since both those dates." Therefore, the claim was for a tract having for its south boundary a straight line.

(*d*) The confirmation is for 356 arpents, which is ordered to be "surveyed agreeably to a concession from Zenon Trudeau to Louis Labeaume;" and four arpents to Jos. Brazeau, the same to be surveyed "agreeably to a reserve made in a sale from Joseph Brazeau to said Louis Labeaume, recorded in book C, page 339, in the Recorder's office." So, as to these "4 arpents" thus confirmed, they *must* be located and surveyed by the *calls contained in that deed*, even if those calls located it in Illinois. The Commissioners did not choose to go back to a concession to Brazeau *never surveyed, and the location and boundaries of which were undetermined*, but confined it to the description and calls contained in that *deed*.

(*e*) The calls are definite, and call for an object at its southern extremity, known from the earliest times — more exact than a river — more noticeable than any other object — "to be taken at the foot of the hillock (La Grange de Terre), in the southern part of said 4 by 20 arpents of land." This Earth Barn, then, is to be at its southern boundary. It is to begin there and run north.

(*f*) The confirmation was a confirmation to the claimant Louis Labeaume, as the Supreme Court of the United States have over and over again decided. Therefore, if in the title papers exhibited there appeared a concession to Labeaume covering the whole, and he abandoned the other, the confirmation was on that; and the Commissioners afterwards finding that there was before them another tract, undertook to confirm that.

(*g*) This construction is utterly at war with the cardinal idea upon which the plaintiff's case is based.

He admits, as he must, that our survey and patent are in strict conformity with Soulard's survey, and that, if Soulard's survey be a correct survey of "*the concession of Zenon Trudeau to Louis Labeaume*" (using the language of the confirmation), it covered the land confirmed to Labeaume and patented to his legal representatives. But to get rid of the force of this they have contended that Soulard did not correctly survey that concession, and have over and over again charged Soulard with fraud in making it. They say that he located its south line just four arpents too far south, and have made plats and examined surveyors in order to show such to be the fact. As the confirmation to Labeaume was "agreeably to the concession of Zenon Trudeau to Louis Labeaume," and as that by its terms required its south line to be a straight line, the plaintiff perceived that there was no room there for his little plat of ground, and that its place must either be found south of the south line of the land surveyed by Soulard, as the south line of the tract conceded to Labeaume, or the south line of the tract conceded to Labeaume must be moved so far north as to allow it to come in.

Where the land lies that is conceded by Zenon Trudeau to Louis Labeaume is one thing; but as it is confirmed just as it was conceded, and, as beyond question that land thus conceded was by the terms of the petition a parallelogram extending from the river west 20 arpents in depth, with an extension to it in an angular form at its northeast corner, it does not seem as if it left much scope to contend that anything could be confirmed as lying within it.

(*h*) But the decision of the Court of Common Pleas was the more extraordinary when we consider that the Supreme Court of the United States had conclusively decided that the confirmation to Labeaume was a confirmation according to Soulard's survey. The instruction in the case of *West vs. Cochran*, 17 How. 412, says so in so many words.

(*i*) The only thing that gives the slightest color to any such vagary is the entry of the clerk of the Commissioners as to

Labeaume's claim and the amount of arpents as stated confirmed to Labeaume.

The clerk, without any consultation with claimant, enters what he supposes is a general idea of the claim. Labeaume had nothing to do with it. No man can make sense out of it. The Court say (17 How. 411) that it is so confused as to be unmeaning, etc.

This first proposition has received the approval of the Supreme Court of Missouri in their decision in this case. (40 Mo. 435–6.)

II. The plaintiff is not entitled to a decree, even if the first survey in satisfaction of the confirmation to Brazeau, U. S. survey No. 3332, and the first patent to Brazeau, never existed, and he could satisfactorily show that the true location of the tract of the 4 by 4 arpents was where he contends it should be.

Here, then, are two confirmations of the same age, one of which, belonging to the defendants, was surveyed by the United States and patented in 1852; and the other, owned by the plaintiff, was surveyed and patented in 1862, the United States reserving to itself the right to survey these confirmations.

We say:

1st. This is not the case of a contest of equities arising upon confirmations of the same age for the same land, located at the same place.

Now, the titles as originally emanating from the United States being equal, and it being a contest about the same tract of land, located at the same place and belonging to one or the other, not a question of location, but simply of title, there might be some ground to contend that the junior patent and survey might have some ground to contend that its equities were superior and might override the elder patent. But however that may be, there is no such case here. Labeaume laid no claim to the 4 arpents reserved by Brazeau, and Brazeau laid no claim to the 4 by 16 he sold to Labeaume.

It is a simple contest of two rival confirmations as to where they shall be located—a question of *location* pure and simple.

This is the 2d proposition that has met the approval of the Supreme Court of Missouri. (40 Mo. 437.)

2d. It is not competent, where, as in this case, there is a survey and patent to Labeaume and representatives in 1852, and a survey and patent to Brazeau in 1862, and both covering the

same land, for the Court to receive evidence that the prior survey for Labeaume erroneously located the land confirmed to him or his legal representatives.

Suppose Brazeau's patent and survey was coextensive with that of Labeaume. Then what is the Court asked to do? Simply to allow evidence to be introduced to show, and upon it to determine as a fact and decree, that Labeaume's claim was improperly located; that the United States (which has reserved to itself the exclusive right of saying what is the true location of its confirmations) should have located it in a different place.

The proposition of the plaintiff is this: that the confirmations are of the same age, and the surveys and patents relate back to the confirmation, and that makes the patents and surveys, no matter when made, of the same age; also all relating back to the confirmation. And it is now for the Court to decide which has the best title to the land, and that is to be decided by considering what, in the opinion of the Court, is the true location of the tracts, respectively, thus confirmed.

We propose to show that this is in the teeth of every decision of the Supreme Court of the United States bearing upon the subject.

The plaintiff relies upon the decision in the case of *McGill vs. Somers*, 9 Mo. R., at p. 87, in which Judge Gamble holds that a survey is only *prima facie* evidence of the true location of a confirmation, and that when there are two conflicting surveys the Court is to survey the confirmation anew and show where the true location is.

But that decision was made before the trial in West vs. Cochran in the U. S. Circuit Court, when *for the first time* the doctrine was laid down that the true location of a confirmation was a matter for the Executive alone, and the courts had nothing to do with it. And this was subsequently affirmed in every decision where this question came up for adjudication. (*Cochran vs. West*, 17 How. 412, 413; *Stanford vs. Taylor*, 18 How. 412; *Kissel vs. The Schools*, 18 How. 25.) In the light of these decisions, we say:

3d. If there be two confirmations on the same day, surveys of both made on the same day, and patents issued on the same day, for the same land, it is not competent for the Court to go

into an examination as to whether these surveys rightly locate their respective confirmations. That matter is to be taken as conclusive, and other matters must guide the court in determining as to which party is entitled to the land.

In the case stated, it is as if the Board had confirmed the respective confirmations after having the surveys made, and as if those surveys had been incorporated into the confirmations respectively.

If such confirmations were presented by parties claiming adversely to each other, no court would for a moment contend that it had the right to consider upon and adjudicate anew the true location and position of the tract conferred.

4th. Then, if confirmations, surveys, and patents were of the same age, the party in possession would prevail. *Prior in tempore, potior in jure.* Both stand upon the same footing, but the party out of possession cannot oust the party in possession.

5th. But as we have the elder patent and the elder survey, our survey and our patent overrides the junior ones of Brazeau made in 1862. At the time the survey and patent for Brazeau, in 1862, was made, the United States had parted with all their title in the tract of land included in the survey for Labeaume and patented for him. (*Stoddard vs. Chambers*, 2 How. 318.)

6th. Neither is the plaintiff's position helped at all by the supposed exception in the Labeaume patent. The exception avails the plaintiff nothing unless it confers upon the Court the power to go into and decide the question of location of these confirmations. This will be apparent if we suppose no patents had ever issued to either—that the parties stood with their confirmations and a survey for each confirmation, made at the same time. Can it for a moment be contended that the question of how these confirmations should be surveyed can be determined by oral testimony before the Court—that it shall say where this confirmation stops and to what place the other extends?

The Courts of the United States say that the government alone can determine that, and that it "*is not the subject of judicial inquiry.*"

This being so, the exception in the patent gave no new power

to the Court, and could not by any possibility give it the power to determine this question of location. When the surveys were made, so long as they remained valid and approved surveys, the locations were fixed beyond power of change.

7th. Upon no facts presented in this case can the plaintiff having the junior patent and junior survey recover against us having the elder patent and survey, and in possession.

We have the superior title, and it can be assailed by showing that we obtained our patent by fraud—that we, by false representations, induced him not to appear and contest our claims before the departments—that we held the title upon a trust for him—or any other fact that would show that we held it fraudulently as against him; or plaintiff, claiming that he held the equitable title as against Labeaume for the 16 by 4 sold by Brazeau, and that Labeaume fraudulently obtained the patent, might possibly sustain an action.

But here there is no priority between the parties plaintiff and defendant, nor ever has been. Both are separate and independent from the beginning.

It is a simple question of conflicting location of two antagonist titles. There are no equities between the parties. None are pretended except as to the matter of location. Labeaume never claimed to own the portion reserved; nor did Brazeau or Chouteau, who, before Labeaume purchased, owned the southern 4 by 4, ever claim that sold to Labeaume.

This is the third proposition approved by the Supreme Court of Missouri in this case. (See Magwire vs. Tyler, 40 Mo. R., 435–7.)

The subject has thus far been treated as if the patent for Brazeau in 1853 had no existence; but

III. The patent to Brazeau, issued in 1862, is inoperative and void as against the patent granted in 1852 to Brazeau.

1st. The patent and survey for Brazeau, of 1853, has been for adjudication before the Supreme Court in two cases — that of West vs. Cochran, and Magwire vs. Tyler — and in both cases were considered and passed upon, and it is not in the power of the executive officer of the government to treat that as a nullity which has been passed upon and considered and formed the subject of judicial decision. The decision is adverse to the plaintiff,

and forthwith he induces the executive officers of the government to set aside a survey and annul a patent (as far as they could do it), and thus attempt to nullify the previous decisions. If this can be done, why cannot the executive officers of the government resurvey the Hustos Lariois grants in California and have these confirmations the subject of litigation anew? The condition of the patent for Brazeau was known then.

Even conceding the right of the executive officers to recall the patent and vacate the survey before it has been the subject of adjudication, it is rather late to recall a patent after there has been an adjudication upon it by the court of final resort.

As to the survey of 1817, we refer to the evidence of Milburn as to the condition of that survey — never approved, and it could not be in the nature of things. Besides, it had never been passed upon by the ultimate judge; but Brazeau's survey was passed upon by the Secretary of the Interior, and patent issued thereon.

2d. The patent to Brazeau of 1853, having been issued upon a survey which had been returned to the Commissioner of the General Land Office and approved by him and the Secretary of the Interior, is not, after it had been issued, subject to be recalled and the patent and survey vacated.

A patent or a survey is not a matter which can be accepted or refused.

The government surveys the confirmations it gives, and that is the end of it. No party has the right to say: "I won't take it there; I insist upon having it surveyed in another place." The government has placed it there, and there it must remain. On that survey the government issues a patent and no one can reject that. One party may decline to take it from the conduit by which it is conveyed to him, but that matters not. It is still a valid subsisting patent just as much as some thousands of patents from twenty to forty years old still remaining at the land offices for delivery. If one does not take it, another man interested in the land can, or it can remain there. But when a patent has issued and passed on its mission, it is not in the power of the United States to recall it without a judicial proceeding to that end. Titles have vested in the faith of it, and

rights grown up under it. (*Lott vs. Brodhommen*, 3 Robinson, La., 293; 13 Lou. An. R. 128.)

One officer of the Land Office is not competent to annul or cancel the act of his predecessor. This is is a judicial act, and requires the judgment of a court. (*United States vs. Stone*, 2 Wallace, 535.)

3d. It is not true that the persons interested in the land thus covered by this patent and survey refused to receive it. On the contrary, the parties who were directly interested — Picot for himself and others, the owners of the Marine Railway — did ask for it, claim it, and set it up, as belonging to them, immediately after it issued and down to the time it was attempted to be recalled.

The Marine Railway trustees conveyed to Magwire all land above Labeaume's ditch. P. Chouteau conveyed to Strother, and to Thomas and the Marine Railway Company, the land below the ditch, but the north line of the survey of the land confirmed to him was 4 arpents and some 20 feet south of Labeaume's ditch. It was of great consequence to the claimants of this land lying between Labeaume's ditch and the north line of the survey to Chouteau to have some title. Esther was unsurveyed.

If Magwire owned any interest in that land, he had conveyed it to the Marine Railway Company.

A suit was commenced by Picot, claiming under that patent and survey, for the land south of Labeaume's ditch, vs. Bogy et al., as will appear from the case reported in 26 Mo. 422. Picot was a purchaser from, or rather under, the Marine Railway Company prior to 1852, and as such he had a right to avail himself of any title that the Marine Railway Company owned at the time of the alienation of the land conveyed to him.

Chouteau undeniably had the title of Brazeau, and, having it, conveyed to the Marine Railway Company the northern part of his survey and all land up to Labeaume's ditch, except a small piece conveyed to Thomas Picot, claiming under the Marine Railway Company, who had a right to the Brazeau confirmation and patent if it covered the land so conveyed to him.

This proposition is also affirmed by the Supreme Court of Missouri, at page 437.

IV. Chouteau and the plaintiff claiming under him are estopped from denying that the location of the reservation of Brazeau is Labeaume's ditch.

1st. Chouteau and those claiming under him are estopped by the terms of the deed of Brazeau to him in affirmation of the verbal sale.

2d. Chouteau and those claiming under him are estopped by the establishment of a common boundary line between himself and Labeaume, commencing in the year 1799 and continuing down for more than twenty years before any suit was brought. *This vests the title absolutely* in accordance with the agreed common boundary. (*Taylor & Mason vs. Zepp*, 14 Mo. 482; *Lindell vs. McLaughlin*, 30 Mo.)

3d. Chouteau and those claiming under him are estopped from setting up this location by the letter of Chouteau, while owning this Brazeau reservation, to the Commissioner of the General Land Office, dated May 20th, 1816.

4th. Chouteau and his assigns are estopped to deny that Labeaume owned the land north of his concession on the river, by calling not for Labeaume's land, but for Soulard's survey of Labeaume's land.

If it shall appear that there was, prior to 1799, a tract lying along the river, above the town, unsurveyed; that that tract called for its boundary another unsurveyed tract, neither being located on the surface of the earth at any time by the Spanish government; that the first tract owned by Brazeau, thus unlocated by actual survey, was prior to that time owned by two persons—one owning the southern, and the other the northern portion; that then Labeaume, so owning the northern portion, made two ditches—one to the north and the other to the south, and distant apart just the length of the land so bought—applied to the Lieutenant Governor for an extension and augmentation of what he had so purchased the next year after he purchased it; that it was immediately surveyed by the Surveyor-General in the place where that northern portion of the Brazeau concession is now claimed by the owners of it to be; that the survey was platted showing this, and showing these ditches upon it just the length of the portion purchased apart from each other; that it repre-

sented that it was made in the presence of the adjoining proprietors; that the next year Chouteau, owning the southern part, applied for a strip of land lying along the river, and he asked for that strip to be bounded on the north by the line of Labeaume, who had thus purchased the northern part, and had asked for an augmentation which had been granted and surveyed by the same surveyor; that it was surveyed in the presence of the adjoining proprietors; that the survey, when made and platted, showed upon it the name of Labeaume as proprietor on the north, and the line of the ditch upon it as the dividing line; that it showed upon the plat that it was Labeaume's ditch which formed the division line on the north of the lot so surveyed for Chouteau; that it showed upon it that the ditch between them formed a fence of stockades; that in 1816, Chouteau, wanting to preserve the evidence of his purchase, obtained from the former owner, Brazeau, a written evidence of his title, in which he called as its southern boundary an object (the earth barn) as prominent and notorious as the Court House or Southern Hotel; that Chouteau always so affirmed it to be until he sold or agreed to sell his land there: — then will not the Court say the location of this 4 by 20 arpents, thus unlocated by any survey, may be doubtful, may be erroneous? With the evidence before us, sixty-seven years after these matters took place, we may think it clearly erroneous; but here these men were the owners of this piece of land; they must have known where it was; they are the only persons interested in knowing it; and not only will we hold them and all claiming under them to the effects of their acts as an estoppel upon them, but we will go further, and hold apart from any estoppel, that we will not attempt to be wiser than the persons who owned it — than the official Surveyor-General, who surveyed the lands of these two persons as contiguous to each other — than the Lieutenant-General, who was the source of the emanation of all titles, and to whom these surveys were returned.

V. No notice having been filed nor any claim made by Brazeau before the Board of Commissioners, their action, founded upon a supposed claim brought to view in the title papers of a claimant actually before them, is a nullity.

The jurisdiction of the Board of Commissioners was created

and limited by the acts of Congress of the 2d of March, 1805, 25th of February, 1806, and 3d of March, 1807.

By the first of these acts it was provided that within a certain time each claimant should deliver to the register or recorder of land titles a notice in writing showing the nature and extent of his claim, with plat and title papers, which were to be recorded; and it further provided that if any person failed so to give notice and produce the evidence of his title, all his right under the act should be forever barred.

The Board were authorized to act and pass upon *claims* presented to them by the claimant in the manner pointed out by these acts of Congress, and upon such claims alone. It was not competent for them, if one claimant should, in support of his claim, file before the Board the whole of the Livre Terreins or Duralde's survey of the St. Louis Common Fields, to take up and confirm all claims contained or embraced in either.

If a claimant appeared before them by written notice, asking the confirmation of a particular lot, and with the notice had filed a part of the muniments of title—a conveyance by way of exchange of lots between himself and another person—there was no authority under the law for the Commissioners to take up, consider, and confirm the claim of that other person to the lot thus conveyed to such other person.

The authority specifically conferred by the fifth section of the act of 1805 is to "decide * * on all claims filed with the register or recorder in conformity with the provisions of this act," etc. When these acts were passed, Congress was particularly guarded in requiring that whoever applied to have a title granted to them should exhibit to the granting power certain and tangible evidence that he had an equitable right to it. There were three things to be done: *first*, there was to be given and filed a written notice of his claim and the nature and extent of it, so that the Commissioners could know what the man himself claimed at that time, for he might have had a grant for 120 feet and have sold 60 feet of it; *second*, he must file the evidences of his title; and *third*, he must prove the possession of the lot claimed, as required by the acts.

This very pretense of title is the most complete justification of the wisdom of these requirements. Labeaume claimed a

specific tract of land. He filed his written notice and his evidences of title, and made his proofs as required by the law. Brazeau filed no claim, made none—because he had none, having in 1798 sold all the land he had then, with the exception of what he afterward conveyed to Labeaume. If he had been a claimant he would have had to have filed a written notice showing *the nature and extent of his claim.* And then there could have been no controversy as to where it was or whether he was claiming any portion of land which had been possessed and fenced by and had been surveyed by Soulard for Labeaume.

The cases supporting this proposition are summed up by the Supreme Court of Missouri in their decision, at page 441.

This, then, is the third proposition which has met the approval of the Supreme Court of Missouri.

VI. All the alleged equities set up in this suit and about the same subject matter were raised, considered, and finally adjudicated upon in the former suit in equity between the same parties, and are thus *res adjudicata.*

For the facts and arguments showing this, I refer to Mr. Hill's brief, in which the whole matter is elaborately discussed, and the above proposition most convincingly shown to be true.

The Supreme court of Missouri so decided in this case, as will be seen in its decision on pages 441 and 442.

This, then, is the fifth ground of defense which they sustained.

VII. The plaintiff is barred by the statute of limitations and by lapse of time. I refer again to the argument and authorities cited in Mr. Hill's brief.

VIII. Even if the Court were sitting in the capacity of a surveyor, for the first time to undertake to locate these claims, then we say that Brazeau's location of the tract confirmed to him is and must be below the south line of Soulard's survey for Labeaume.

On this head we say:

1st. That prior to Soulard's survey for Labeaume there were no surveys at all on the river from about Cherry street to the Rocky Branch. The precise location of any concession or land

asked for on the surface of the ground was a matter entirely of conjecture.

2d. The first person on the land in that vicinity exercising any acts of ownership was Joseph Brazeau. (See evidence of Labbe Smith, Labarge, Hortez.) It was at a time prior to either the concession to Chouteau or Labeaume. The possession of Brazeau was south of Labeaume's ditch—south of the south line of Soulard's survey. He had on it a lime-kiln and was engaged in burning lime. The building of a lime-kiln must have been regarded in those times, when what we should consider almost abject poverty prevailed, as an expensive affair. It was either on his own land or it was not. If his land only extended as far south as Labeaume's ditch, then it was not on his own land. There was no facility for getting stone when his lime-kiln was erected more than above Labeaume's ditch. The kiln was not only expensive to construct, but was intended to be permanent. Why commit a trespass and subject himself to such loss, when he had land just above it just as available? The presumption is irresistible that Brazeau, when he built that lime-kiln, regarded himself as building on his own land.

3d. The petition of Brazeau speaks of his wanting to have granted to him a tract of land at the western part of the town of 4 by 20 arpents, "situate beyond the *foot* of the Mound"—not beyond the Mound, but beyond the *foot* of the Mound—that is, beginning at its northern (or eastern) edge and extending to the environs of Stony Creek—not to Stony Creek, but to its *environs*.

The surface of the land, as it was then and is now found opposite to Mound up to Stony Creek, is, on the river, almost a dead level. The highest point at the west and four arpents from the river is only 46 49-100 feet in 780 feet, and, for some distance south from Labeaume's ditch, almost a dead level.

4th. Brazeau, thus having a concession of 4 by 20 arpents unsurveyed, sells prior to the 9th of May, 1798, and probably prior to the 4th of August, 1797, the southern 4 by 4 arpents of his tract to Pierre Chouteau, and is paid by Chouteau at the time of sale the purchase money for it; and thereby Chouteau owned the land absolutely and had no need of a deed for it except to

preserve the evidence that he had paid for it. All this will appear from the recitals in the deed of Brazeau to Chouteau in 1816, when Chouteau, for pressing reasons of his own, wished the paper evidence. I say he probably sold prior to the 4th of August, 1797, to Chouteau, because Chouteau, in his petition of the 15th of October, 1799, speaks of having already, on the 4th of August, 1797, petitioned for the same tract.

If we take the amount afterward paid by Labeaume to Brazeau for the northern portion as a criterion, Chouteau paid Brazeau for the 16 arpents just $10.08.

As to a sale by parol passing title, see *Allen vs. Moss*, 27 Mo. 354; *Hogan vs. Page*, 2 Wallace, 608, 609.

5th. There now remained 16 by 4 of this unsurveyed tract to be disposed of; and on the 9th of May, 1798, Labeaume bought the 64 arpents from him at $40, just 62½ cents per arpent, and in that deed he says that his concession consists of "4 "arpents of land to be taken from the foot of the elevation "or hillock commonly called the Earth Barn, by 20 arpents in "depth, bounded by Rocky Creek at the extremity opposite said "hillock—the said Brazeau reserving to himself 4 arpents to be "taken at the foot of the hillock in the southern part of said "land."

Here, now, the whole 4 by 20 have been disposed of, so that when the deeds come to be made, the southern portion of Brazeau's tract is called to begin at the foot of the earth barn. Brazeau sells it by that call; Labeaume and Chouteau take it as having such calls for its southern boundary.

6th. Labeaume, after owning the land thus purchased for about nine months, and after having made ditches running to the river just 16 arpents apart, presents his petition to the Lieutenant-Governor for an extension to the north and augmentation to the west. He had purchased the 16 by 4 arpents for this purpose, because it interfered with land he wanted. If the southern 4 by 4 arpents of land interfered with what Chouteau wanted, we can understand why he wished to buy $10.08 worth of land there; but unless it did, no one can conceive a reason why he should purchase it. He had tried to get land along the river front in that vicinity before. He found Clamorgan claim-

ing under Esther, whose pretensions he could soon dispose of, but Brazeau interfered with him, and to just the extent of four arpents. Why should Chouteau wish to buy this precise number of arpents, unless it interfered with him to that extent?

7th. The plaintiff feels the force of the making of these ditches, and feels that it is conclusive against them, both as to location of the land purchased and as to boundary fixed by coterminous proprietors, if they were made as inclosures of the land; and to escape such a fatal conclusion say that these were merely ditches made to drain the land, and were made in the lowest and most eligible places.

To this assumption there are ten conclusive answers.

(*a*) These two ditches formed, with the western ditch and the river, an entire inclosure. As the west ditch at its northern end extended up to high ground, there was no earthly reason, if it was a mere drain, that it should have joined the north ditch, nor, in fact, if it was a mere drain, why the west ditch existed at all.

(*b*) If a ditch merely, why were they parallel—why not run the ditches, or some of them, diagonally? If designed to drain the lowest part of the land, why make any angle at the southwest corner? All this is very proper if the ditch was the inclosure of a field, but perfectly senseless if a mere drain.

Why is Labeaume running ditches upon another man's land?

(*c*) The two ditches were not only parallel, but, with the river and the western ditch, formed a parallelogram, or nearly so. If Labeaume wanted only a drain from his land bought of Brazeau, and that land was 4 arpents north, why did he not run his ditch diagonally across the other man's (Chouteau's) land? Why run it just to form what is alleged to be the south boundary of Chouteau's land spoken of as reserved by Brazeau?

(*d*) It is the most singular coincidence that ever happened, if these were mere drains and had no relation to the lines of the land, that they were not only parallel to the true lines, but were just 16 arpents apart—the exact distance in length of land purchased.

(*e*) It is a still more singular coincidence that this south drain should be not on the south boundary of line of the land Labeaume

purchased, nor between that line and the line as we say it is—which is a distance of 770 feet—but just on the line as we say it is.

(*f*) If for a drain merely, the earth would have been thrown out on both sides or on either side indiscriminately, and not on the inside to form a further protection.

(*g*) The dirt was not only thrown upon the inside, but was surmounted by a stockade, which certainly no mere drain would have been. (See testimony of Lalbi at page 188, and Labarge, 191, 192, of printed record.)

(*h*) These ditches are pictured on the plat of Soulard's survey as returned to the Lieut. Governor, together with the houses on the tract, which certainly would not be done in the case of mere drainage.

(*i*) These ditches, which the plaintiff says are mere drains, placed as they were, only as being in the most convenient place to drain the land, and having no relation to boundaries, are found to be exactly coincident with the north and south lines of the tract afterwards petitioned for by Labeaume and surveyed for him by Soulard.

(*k*) The south ditch appears pictured *on the plat* of the land asked for by Chouteau and surveyed for him by Soulard as "Labeaume's ditch," with the words: "*Fose que serve de estacada*" —ditch which serves for a fence or stockade. Here is Mr. Chouteau accepting a survey of his land, which survey called for a north boundary—the land of Mr. Labeaume as a *fenced* possession—Chouteau at the time owning the 4 by 4 arpents. (See plat at page 142 of printed record.)

This certainly would not have been the case of a mere drain. *This forever concludes Mr. Chouteau and those claiming under him.*

In reply to a suggestion that the west ditch was not on the land Brazeau sold to Labeaume, we say—first, that does not show that it was meant as a mere drain and not to inclose a field in which there were already houses; and, second, that it was probably made between the time Labeaume asked for the concession to him and the time it was surveyed by Soulard; or more

probable still, that the Lieut.-Governor had made a verbal promise to him after he purchased of Brazeau of augmentation which he asked.

8th. If, then, these ditches were made north and south to inclose land claimed to belong to the person making them, he (Labeaume) was either entirely mistaken as to the location of the land he bought of Brazeau, or that knowing it, he went deliberately to work to push his possessions further south by 4 arpents than he had any right to do, and to perpetuate a deliberate swindle, not on Brazeau, but on Chouteau, who owned it, and who was perfectly familiar with the records here, and had already, on the 4th of August, 1798, petitioned for a grant of land in that vicinity, out of land, too, worth $10.08, and which Chouteau had no earthly use for, and would most gladly have sold to him for a tenth part of the money necessarily expended in this attempt at a swindle.

9th. We then assume as conclusively proved that these ditches and stockades were made to inclose what Labeaume claimed as his and intended to hold on to.

In about nine months after his purchase he presented his petition for an augmentation. What did he want—an augmentation of that he held in possession and enclosed? Or what did he intend to ask for—an augmentation of a tract 4 arpents north of his south fence?

If he did, then his fraud availed him nothing in wrongly locating the land he bought of Brazeau. It is to be presumed that, whatever form of words he used, he intended to obtain an augmentation of what he had already under fence upon the river.

Did he do it? If we examine his petition we shall find that the tract that he bought of Brazeau was to form the basis of it, which was stated to be sixteen arpents long, and that he intended that the piece that he fenced off—just sixteen arpents long—(whether fraudulently or not is immaterial now) should be considered as being the property so purchased.

That was the thing to be augmented. The angle to the north, as an extension, was of little moment.

Exact words describing that were not deemed important;

because if it was an augmentation of the land he had in possession, then that would control; and because that fractional extension to the north was not considered of much moment.

10th. Soulard surveyed the tract asked for by Labeaume on the 2d of March, 1799, and returned the plat. Now, there is one point upon which we are all agreed — that Soulard surveyed this piece of ground thus augmented just as we contend it should be; but they say it was done by MISTAKE or FRAUD.

In answer to that we say:

1st. It could not have been so surveyed by any mistake. In the first place, leaving out of question the adjoining proprietors, it was done in the presence of Labeaume, who could not possibly be under any mistake as to the land he desired and intended to have surveyed as the land conceded; and in the next place there could be no mistake on the part of Soulard, who was Surveyor-General; and if Brazeau or Esther had any location whatever, fixed and certain, he was the man of all others most likely to know it.

Then, if not properly surveyed, it must have been a fraud both on Labeaume and Soulard.

Let us see if this is probable:

1st. Is it probable from the position of the men? Mr. Soulard, in one of the most important public positions here; Mr. Labeaume, always one of the most wealthy and influential citizens — both of whom went to their graves without the shade of an imputation upon their characters, so far as I ever heard.

2d. The idea that this fraud was committed by these gentlemen about a piece of land worth $10, and which Mr. Chouteau, the owner, would in all probability have sold for $20, seems to us to be somewhat improbable.

3d. The survey was made, as is stated, in the presence of the adjoining proprietors; and if so, it must have been in the presence of Chouteau, who owned the 4 by 4, as well as others.

4th. It must have been a designed fraud by Soulard, in the interest of Labeaume, upon Chouteau, which to those who know the relations subsisting between Soulard and Chouteau is more ridiculous than all.

5th. Eight months after, Soulard's survey for Labeaume had been made and returned so as to be known by all. Chouteau asks the Governor for a piece of ground lying along the bank of the river, "and bounded as follows: on the north by the line of Mr. Louis Labeaume, on the south by that of Mr. Antoine Ray, on the east by the river, and on the west by the domain of his Majesty; passing up the hill 6 arpents from the river, which will be its depth."

Now, as they claim under Chouteau, this is annihilating unless they can explain it away; and this is how they attempt it: The plaintiff says Chouteau's claim extended west 2 arpents more than Brazeau's, and that when he called for Labeaume's line he called for the two arpents that adjoined him, lying west of the 4 by 4 that he owned. This will not do, for a number of reasons:

1st. He calls for his north boundary "the *line* of Mr. Labeaume's land," not by Mr. Labeaume's land.

2d. If the 4 by 4 lay above him and belonged to some one else, he would have said partly by Mr. Labeaume and partly by the other owner.

3d. But as the land, if it laid above him, belonged to himself, he would have said partly by land of Mr. Labeaume and partly by land of your petitioner.

4th. But the conclusive thing is that he was calling, even on their theory, not for Mr. Labeaume's land as they say it was and should be located, but for Labeaume's land as Soulard located it by his survey. He knew perfectly well where Soulard had surveyed Labeaume, and if he claimed that the 4 by 4 lay above the ditch, he knew that Soulard's survey included it; and he then, with this knowledge, was calling for "*the line of Mr. Louis Labeaume*" as his north boundary.

The first, then, would prove a stupidity inconceivable in Chouteau, but the last proves it to be simply impossible.

But the plaintiff says that he speaks of Clamorgan interfering with what he asked for, and of him only.

Of course he does; for as he then owned the 4 by 4, Clamorgan alone interfered with him.

12th. In 1803, Chouteau's concession was surveyed by Soulard—Labeaume and Soulard both being present—and a plat of

it made by Soulard and returned, which calls not for the 4 by 4 owned by Chouteau on the north, but deliberately called for Labeaume on the north; and not only Labeaume on the north, but Labeaume's ditch by name as the boundary line; and not only Labeaume's ditch, but Labeaume's "*fose, que serve de estacada*" (ditch, which serves for a fence)—thus showing that it was a fence of Labeaume's land; thus notifying him, if he required any more notice than the use of his eyes would give him, that his coveted 4 by 4, which these gentlemen say he owned above the ditch, had been bodily swallowed by Labeaume and fenced up as belonging to him.

13th. In 1816 Chouteau asked and got from Brazeau a written evidence of the sale which had taken place some eighteen years before.

Although the Lieutenant-Governor, in his grant to Chouteau, had annihilated Esther's claim, yet, after Clamorgan's death, this pretension was sold under execution and bought by Chouteau to prevent any one from troubling. But Chouteau never presented it for confirmation at any time, but he had presented his own claim to the first Board and it had been cut down so that by the quantity called for in the confirmation, upon being surveyed by Brown, he found that between his north line, as surveyed or about to be surveyed by Brown, there would be a space of just 4 by 4 arpents.

Then, for the first time, the title of the 4 by 4 arpents, which was swallowed up by his own grant, became important, and he seeks and gets from Brazeau a deed. *When he did this, he knew all about what Labeaume claimed, all about Soulard's survey of Labeaume's claim, all about Labeaume's claim before the Commissioners.*

Then, with all these facts, he prepares the deed he desires.

Now, how does he describe the land he bought from Brazeau, and which the plaintiff says he claimed to be above the ditch?

This is the way the land is described in that deed which he accepts as the land bought by him before 1798 from Brazeau. In describing the whole concession he says: "which concession consists of four arpents of land, to be taken from the foot of the hill or mound, commonly called Lagrange de Terre, by twenty arpents in depth." And the words used to describe the land

granted are: "four arpents of land in depth in the south part of said concession, at the foot of the aforesaid mound, bounded on the east by the Mississippi, west by lands unknown, being the same which I, the aforesaid Joseph Brazeau, reserved by the said deed, made and passed between the said Labeaume and me, above mentioned."

14th. Brown makes the survey of the confirmation to Chouteau. After this, and in 1826, Chouteau makes a protest, in which he says that Peyroux's location covers the tract of 4 by 4 he purchased of Brazeau. Peyroux's location has for its north line Labeaume's ditch. The plaintiff, in answer to this crushing fact, says, because Peyroux begins for his northeast corner by calling for a tract of land on which William Christy resides (as they say)—William Christy's inclosure was then at least 4 arpents north—that they were calling for that. But when you call for the tract upon which a man has his house, you are calling for a tract which he claims by deed or conversion. (See deeds for what that was.)

Chouteau says, "not only does the *location* cover the small tract which I had purchased from 'Mr. Joseph Brazeau,'" but he says it was the same tract confirmed to Brazeau. But, in point of fact, Chouteau is calling for H. Peyroux's, located by survey; and the location likewise calls for a tract of land formerly belonging to and confirmed to Louis Labeaume.

But the plaintiff says Chouteau's letter is not to conclude him, because

1st. He made another protest in 1818. But when this is examined, it will be found that it does not in any manner disagree with the statements contained in the one of 1826.

2d. That Chouteau in 1823 commenced a suit for the 4 by 4 above the ditch. When we know that Mr. Chouteau had previous to that time made an agreement to convey the land in that vicinity, with other land in the lower part of the city, to George F. Strother, and that Strother used the name of Chouteau to bring the suit, and that, that suit failing, Strother abandoned the matter, and after Chouteau's protest bought the land in that vicinity from him, we shall see how much weight this has.

Now let us examine what is urged against all this.

The key of the position of plaintiff — that upon which the sur-

veyors that he has called, Clark, Conway, and Hyer, start from as controlling all this — is the call that is made in the concession to Brazeau that it shall be bounded on the south by land granted to the free mulattress named Esther; and they contend that Esther necessarily comes up to the ditch, and to prove this they rely upon three things:

1st. The petition and concession to Esther call for the northern part of the "concession now petitioned for to be situated between the Mound, commonly called La Grange de Terre, and the banks of the Mississippi." Now, what would be the construction put upon this language, uninfluenced by any other consideration? Would it not be that the north end would be situated so that it lay just east of the Earth Barn — so that its northern end did not go but just to the north edge of a line running from the Earth Barn east to the Mississippi? This is just the position we contend the concession was asked for.

2d. The rough plan on the back of the petition is, however, invoked, as absolutely controlling this.

In answer to this, we say that this plat, the writing on the margin, and the three lines beginning with "approved" and ending with "possession" at end of concession, are all interpolations; and we expect to show it so conclusively that there shall remain no reasonable doubt. We say:

1st. That petition calls for no plat.

2d. It could have been pictured at the commencement or at the end of the petition, and not on the back of it.

3d. It is certain that the portion in the body of the page was in fact first written; that as written it is complete in itself, and that it bears date the 5th day of October, 1793. It is certain that the writing in the margin (which must have been written after that in the body of the page, and consequently on or after the 5th day of October, 1793) bears date the 3d day of October, 1793.

4th. One instrument perfect in itself, as a concession, is cut in two by a cross, referring to matter written in the margin, taking a portion of which with that part of the body of the page preceding the cross, a new instrument is made perfect in itself; and with the remainder of the part in the margin, and that por-

tion of the body of the page succeeding the cross, another new and perfect instrument is made. This is a method of making official documents altogether unprecedented and quite unique. The addition of the "etc." at the termination of the marginal part only makes it a little more peculiar.

5th. The signature in the middle of the marginal portion does not purport to be the signature of Trudeau himself, for it says, "signe, Zenon Trudeau."

6th. The signature in the marginal part is evidently the same handwriting as the other part. (See photograph.) are also the words "montagne de grange de terre"

7th. The whole of the marginal portion is proved to be in the handwriting of Jacque Clamorgan. (See Renard's testimony, p. 221, printed record.)

8th. That portion of the concession commencing after the date 5th October, 1793, in these words (as translated), "approved "thirty-two lines written on the margin here behind and "marked by a cross on the decree of delivery of possession," is proved to have been written with blacker ink, and has a different appearance from the part above, and has the same general appearance as the marginal portion. (See certificate of Renard, p. 240 of printed record.) It comes down also upon the signature of Zenon Trudeau.

9th. This is proved to be the only marginal note or interlineation in the whole six books of the Livre Terreins. (See certificate of Renard, p. 240.)

Was such a thing as these interpolations entirely unprecedented? That such things were by no means uncommon is proved by the report of the first Board of Commissioners upon the Kaskaskia land claims under grants from the French and Spanish governments. (See 1st vol. Public Lands, at pp. 590–1; 2 *id.* 126.) The final paragraph of that report is very significant as to the nature and extent of the frauds thus practiced.

It will be asked, what motive had Clamorgan to practice this fraud? Clamorgan, a year after the grant, became the owner by deed, as he always was in fact, of the pretensions of Esther. Roy petitioned, in 1797, for 600 feet square on the river, all of which interfered with and was covered by Clamorgan's claim under Esther. Clamorgan offered to surrender one arpent or a

front of 92 feet to him, but the Governor annulled the petition of Clamorgan entirely, so far as Roy was concerned, and granted the land to Roy, and Roy made permanent improvements. Chouteau afterwards petitioned for a tract above Roy, and got it. When the grants were to be presented before the Board, Clamorgan despaired of moving Roy, as his tower was there, but thought it a fair battle with Chouteau, and then wanted to push the land conceded up so that it would not interfere with Roy.

The *third* objection against our view, and what is thought to nail the matter, are certain proceedings in the application of Antoine Roy, which it is asserted prove that there was, at the time of Roy's application to the Lieutenant-Governor, an interference of only one arpent between what he wanted and the land granted to Esther and by her conveyed to Clamorgan.

To this we answer:

1st. It is an entire mistake to suppose that Clamorgan was talking about a mere interference with him at the lower end of his tract of one arpent. On the contrary he was insisting that he owned all that Roy petitioned to be granted to him, and that Soulard was about surveying for him, (Roy)

2d. If it was not so, and was only an interference at the upper end of what Roy wanted of an arpent, as Clamorgan expressed a readiness to give Roy an arpent in width on the river by any depth, why did not the surveyor proceed at once to survey it? There was no conflict here—all were agreed according to the idea of the plaintiff of what the interference was.

3d. If this was the case, what necessity of any annulment of Clamorgan's or Esther's pretensions? The Lieutenant Governor would have said: "You need not come to me; Mr. Cla- "morgan is ready and has offered to surrender all that inter- "feres with what Mr. Roy wants."

The only possible reason why he did not dismiss them at once can be that he knew very well that what Clamorgan was asserting, and what he knew to be the real fact, was that Clamorgan's concession covered *the whole* of what Roy was asking for; and therefore to grant Roy anything he had to annul Esther's title and pretension up to the north line of the tract asked for by Roy.

4th. But the plaintiff says the United States surveyed the confirmation to Esther in the place he says it should be.

It was surveyed after the present suit was commenced, through the efforts of the plaintiff and the Marine Railway Company, to meet a want, as the Marine Railway Company found that as Brazeau had been surveyed above the ditch, they had no title between the north line of the Chouteau patent and south line of Labeaume, unless they got Esther surveyed there; to cover the vacuum, they were anxious to have it made, and the plaintiff was equally anxious. As that survey could not interfere with us, we had and made no objection, and would not have been heard if we had made one, because we had no interest in the land covered by it.

The second matter that they lay great stress upon is the call in Labeaume's petition for his north boundary to be a perpendicular, to be taken from the descent of the road into the creek.

To this we answer—

1st. That if the portion of the tract of Brazeau which he sold to Labeaume be located as the owners of that and the remainder always insisted it was located, that is the controlling call, and if any other calls be inconsistent with it, then those calls must give way; but we say that this call for the north boundary, instead of being inconsistent with the primary and controlling call, is entirely consistent with it and supports it, for—

2d. The call for the place from which the perpendicular is to be dropped is not the place *where the road crosses the creek*, as assumed by the plaintiff, but "*from the descent of the road into the creek*"—that is, from the place where the road begins to descend into the creek, which is the very spot where the north line of Soulard's survey strikes the road. If it is where plaintiff says it was, why use the circumlocution — why not say at once, "*from the place where the road crosses the creek?*" The words used were used because that was not the place intended.

3d. But there is another matter which conclusively shows that we are right in our construction. If the perpendicular be dropped from the place *where the road crosses the creek*, it leaves in

the angle but about 15 arpents. But Labeaume in his petition asks for a grant of *three hundred and sixty* arpents, consisting of a part of 16 by 20 arpents, in all 320 arpents, and says that the portion north of this parallelogram will about complete the quantity asked for; but if he meant to have the perpendicular dropped from the place where the road *crosses* the creek (that forming the north line of the parallelogram he was asking for), and not from the *descent* of the road into the creek, he would at most only get 335 arpents; but if he really meant the *descent* of the road into the creek, the angle or portion above the parallelogram would complete the amount asked for, as that angle contains now about 42½ arpents, making 362½ arpents in the tract asked for, in the present more exact measurements.

4th. But plaintiff says you have not accounted for the short line of the road from the top of the hill to the creek. To this we answer, Labeaume was not making a survey. He was only giving a general idea of the land he wanted and expected to have surveyed. All that he intended to do was to point out with sufficient exactness what he was asking for.

The third matter is acquiescence in the surveys. All the answer that is required to that objection is the evidence of General Milburn. We got a survey, not according exactly as we were entitled to it, but such as we were satisfied with, in 1833; but when we asked for a patent, as the court in Cochran vs. Vice had called for Soulard's survey, the Secretary ordered a survey to conform to it.

The fourth matter urged against our view is the terms of the two confirmations to Labeaume and Brazeau as to number of arpents.

No computations can exactly explain how the number of arpents were put down, but it is the same kind of mistake as plaintiff's counsel has commented on in relation to Chouteau's grant, and one not unlikely to be made by the commissioners or their clerk. But one mistake they did not commit. They did not attempt to locate an unlocated concession. They said we have no other document that furnishes any guide but this deed of Brazeau to Labeaume. Labeaume does not claim but the 16 by 4 northern arpents. Mr. Brazeau, when he made the deed to Labeaume, knew where his grant was desired and granted. He has described

the reservation in this deed, and in that he locates the south line of his tract by a ~~monument~~ monument as imperishable as the eternal hills.

We have the northern 16 arpents to confirm, *as included in Labeaume's petition and Soulard's survey of it;* and though no claimant appears before us, the remainder ~~and~~ small remaining portion is just as meritorious as Labeaume's. We will make a confirmation of that, also, though no one appears here claiming it. But we will do it so that it cannot affect Mr. Labeaume, and by the call for a monument — the best known of any natural or artificial monument in the territory. We will fix it beyond dispute or cavil.

We have thus gone over the whole matter of the true location of the land in dispute, and maintain that the evidence is overwhelming that the tract petitioned for and granted to Labeaume is just where Soulard surveyed it for him, and that the southern four arpents reserved by Brazeau is just where Brazeau, in his deed to Labeaume, said it was—beginning at the foot of the Grange de Terre and running north four arpents.

JOHN R. SHEPLEY,
for Defendants.

Supreme Court of the United States.

DECEMBER TERM, 1868.

JOHN MAGWIRE, PLAINTIFF IN ERROR,

vs.

MARY L. TYLER AND OTHERS, DEFENDANTS.

T. EWING,

For Plaintiff.

J. L. Pearson, Printer, corner 9th and D streets.

MAGWIRE vs. TYLER.

Before proceeding to the discussion of this case, it is important to settle as nearly as possible the exact question before the court. The record is a singularly confused mass of heterogeneous matter—it contains, indeed, everything necessary for a full development of the case, and very much that has nothing to do with it, apparently thrown in to cover up and confuse the actual case—it is all in wild disorder. The case before the court is—

A writ of error to reverse the judgment of the Supreme Court of Missouri, in a cause originating on a petition in equity in the court of common pleas of that state, in which a decree was rendered in behalf of petitioner, and from that taken by *appeal*, or writ of *error*, it is difficult to tell which, to the supreme court, and there "reversed, annulled, and held as nought."

This case is a writ of error to reverse the last named judgment.

The decree of the court of common pleas is found on pages 29 and 30 of the record. New trial refused, p. 323. The decree in the common pleas is general; that the plaintiff recover the 4 by 4 arpents of land according to survey and patent, with the rents and profits, duly found and specified.

The decree of reversal is to be found on page 350. It is also in general terms, "that the judgment herein rendered by the St. Louis court of common pleas be reversed, annulled, and for naught held and esteemed;" "that the cause be dismissed," &c.

In the case of West vs. Cochran, the court held that as the plaintiff, representative of Brazeau, had neither *survey* nor *patent*, (17 Howard, 410, 415–16,) for the lack of these

were a question of *boundary proper*, and that question arose under the laws of the United States and the acts of its officers in the execution of those laws, this court would have jurisdiction as in all other questions arising under such laws and acts.

The case, in itself simple, is rendered confused and complicated by a mass of extraneous matter introduced in the answer and brief of defendants, partly unsupported by proof and partly irrelevant to the points in issue. By none of this will I be turned aside, but proceed carefully to examine the actual case as it is presented by the record, and the several points in their order as they arise out of it.

The plaintiff claims title under Joseph Brazeau through Pierre Choteau. The defendants claim under Joseph Brazeau through Louis Lebaume. The question, the decision of which settles the justice and equity of the case is, which of these, Choteau or Lebaume, actually acquired a right or interest in the four by four arpents in controversy under Brazeau. The settlement of this question requires an examination of the title *ab initio*. Its decision in our opinion decides the case.

At the time of the inception of Brazeau's title, there was, about one mile north of the then town of St. Louis and about five arpents west of the bank of the Mississippi, a large mound known as the *Grange de Terre;* it was situated on the top of a hill some sixty feet high, which hill sloped eastwardly towards the river a long front, and northwardly for about four arpents where it reached a depression, being a natural drain about four arpents from the river at a point B on map No. 253, (Rec. p. 136,) from which going north it rose but little. The exact shape of the hill can be had from the map 253 at page 138.

Prior to Brazeau (Oct. 15, 1793, p. 31–33) a concession was made to a free mulatress Esther, of a tract described as "having four arpents front on its two extremities which will be running from the E. N. E. to the W. S. W. on

twenty arpents running from N. N. W. to S. S. E. situate in the northern part of this town, then *the northern portion* of this grant will be situated between the mound called the Grange de Terre and the river," "the side next the river shall be bounded by the bluff bank of the river," to which concession is appended a pen plat showing the position of the land conceded as to the river and mound, p. 31–32.

As the concession to Brazeau is bounded on that of Esther, it is important that hers be borne distinctly in mind.

In June, 1794, Joseph Brazeau petitioned for a tract of land "situate beyond the foot of the mound called La Grange de Terre, of four arpens in width, which are to extend from the steep bank of the Mississippi river in the west quarter S. W. by about twenty arpents in depth, that shall begin at the foot of the hill on which stands the Grange de Terre, ascending in a N. W. course to the environs of Stony creek, so that the lands now asked for be bounded on the east side by the Mississippi, &c."—(Record, p. 33–34.) Then follows the certificate of Zenon Tradeau, dated June 10th, 1794, in which he certifies "to have put Joseph Brazeau in possession of the parcel of land *designated in his petition* of four arpents front by twenty arpents deep, which shall extend in a N. N. W. course from the foot of the hill where stands the Grange de Terre, ascending to the vicinity of *Stony creek*, bounded on the one side by the bank of the Mississippi, and on the opposite side by lands not conceded or united to his majesty's domain, and at the two ends bounded on the N. N. W. by the vicinity of Rocky creek, and the other in the S. S. E. shall be bounded by land granted to the free mulatress named Esther."

The concession, dated June 25th, 1794, follows the petition and certificate substantially, but differs in mere wording; it makes the tract "begin beyond the mound called La Grange de Terre."—(Rec. pp. 34–35.) The three pa-

pers are, in effect, one. The certificate refers to the petition, and adopts it. The governor puts "Joseph Brazeau in possession of the parcel of land *designated in his petition*," and he concedes to him "the tract of land *hereinabore designated*," so that, whatever particularly of description is found in any one of these papers, may be logically predicated of all. Now, having examined carefully the descriptive language of the concession to Bazeau, and of that to Esther, which forms one of its boundaries, I will ask the attention of the court to the several plats, by which the location of the concession may be fixed with mathematical certainty: and first, the plat accompanying Esther's concession, (31,) the explanatory description is:

"The *northern part* of the tract will be situated between the mound * * and the river." It is not bounded by the mound, but by the bluff bank of the river, from which it extends four arpents towards the mound. The northern line of this tract was, as yet, indefinite, but as the *northern part* of the 20 arpents lay between the mound and the river, it might have been fixed, with reasonable certainty, by assuming that northern *part* means northern *half*, and dropping a line, from the centre of the mound, eastward, so as to cross at right angles a line running parallel with the general course of the river. This would be the middle line of the northerly *part* of the tract, and five arpents north of this would be the north line; or, if we take the plat connected with the concession, (p. 31,) it will produce the same result, and Brazeau's concession, which bounds upon it, shows it to be 20 arpents S. S. E. of a point in the vicinity of Rocky creek, coming to the same point. Defendants assume, and the case rests, on the assumption that the *north line* of Esther, by the terms of the concession, lies between the mound and the river. Is it so? On plat No. 282 (p. 137) and 253, (p. 138,) the tracts are laid down, from careful survey, and the topography of the hill and mound delineated. The point, 4 arpents from the river, from which the west-

ern line of the Brazeau tract springs, and from which it is produced 20 arpents to Rocky branch, is necessarily the northern terminus, at the foot of the hill, at the point D on Hyer's map.—(Map, p. 96.) For a point, at the foot of the hill, east, would be point no point, that line of the face of the hill being a long one. You might assume a point on the south to run east, but not to run north. The point, then, is at the foot of the hill, at D; from that, to the vicinity of Rock creek, is 20 arpents, maintaining well the due distance from the bluff river bank, and answering the boundary on Esther's northern line. If we produce Brazeau's parallelogram four arpents south, as claimed by defendants, we run four arpents in length and one arpent in width into the river, and miss, to that extent, the boundary on Esther, and make Brazeau's tract four arpents too long. If we admit their alternative—run the line, from the foot of the mound on the hill, to the vicinity of Rocky creek—we make the tract four arpents too long, about two arpents too wide, and depart from the boundary on Esther's northern line.

Neither of these will do. The tract, as laid down on the plat, page 96, a survey made by order of court and therefore of itself evidence, fills all the calls with great exactness, while the construction claimed by defendants departs from them wildly and widely.

On the 9th of May, 1798, Brazeau conveyed to Lebaume "a concession of land to him given the 21st day of June, of the year 1794," "consisting of four arpents of land, to be taken from the foot of the elevation or hillock, commonly called the Grange de Terre, by twenty arpents in depth, bounded by the Rousseu de Pierre at the extremity opposite the said hillock, bounded east by the Mississippi river," * * * "reserving to himself four arpents of land to be taken at the foot of the hillock in the southern part of said land," * * "only selling to this effect sixteen arpents in depth to said Lebaume, who accepts, &c."—(Rec., p. 34–35.)

Curiously enough, the language of this conveyance and the reservation therein first raised the question as to location. The reservation "at the foot of the hillock commonly called the Grange de Terre," instead of "at the foot of the hill on which stands the Grange de Terre," as in the previous papers conferring title, has done much to cause this protracted litigation, and yet to a surveyor or locator there can be no question as to the construction of this paper. It refers to the series of papers conferring title on Brazeau, and therefore however defective in description, or even erroneous, forms a part of them and explains and corrects itself by them. But it is not ambiguous or defective. It bounds the tract by the Rocky creek and the Mississippi, and

makes the corner nearest the mound twenty arpents from the creek and four arpents from the river, thus bringing it to D at the foot of the hillock on which the mound stands The original lines are reversed in this deed and Lebaume's sixteen arpents commence at the "Rosseu de Pierre," and he is entitled, by the very terms of his deed, to 16 arpents, on the line, from that point toward D, and has nothing to do with the other four arpents of the tract, its lines or location, unless he hold it under his patent *in trust* for Brazeau.—(See Hyer's Map, Record, p. 96.)

The defendants lay great stress on Chouteau's survey of the Esther tract, of which he asked and obtained a concession in 1799, in which the surveyor notes the ditch as Lebaume's ditch, and makes it a boundary, (p. 40, and Plat,) but it bears directly against them, as far as it applies at all. If Chouteau knew of the locality of the four by four arpents, and considered himself the owner, and understood that they lay south of the ditch, he would not have petitioned for, or had surveyed to him, on a new concession, as "vacant" land which he already owned, for the four by four arpents must necessarily lie on one side or other of the ditch. But Chouteau, at that time, knew nothing of the locality of Brazeau's sixteen arpents. Brazeau had promised him that quantity of land, but does not appear to have told him where until 1816, when he made the deed, (39–40.) Until that time, Chouteau paid no attention to it whatever, not even to present this claim to the commissioner, in 1806 or 1810. In 1799, it was of very trifling value; of little consequence to Chouteau, who was rich in land, and Lebaume having made the ditch, it was, no doubt, generally called Lebaume's ditch, and was probably represented to Chouteau, and believed by him, to be Lebaume's ditch boundary; but the note on the survey was the act of the surveyor, not of Chouteau, and was, of course, a matter of indifference to him.

I submit that it is proved, beyond all question, that after his conveyance to Lebaume, Brazeau was the lawful owner of the four by four arpents lying at the S. E. end of his tract, and that his S. W. corner was at the foot of the hill on which stands the mound, and at the point marked, on plat No. 253, p. 96, by the letter D.

Lebaume understood this perfectly, and represents his rights truly, in a petition soon after filed for the extension of his grant. He says he acquired from Brazeau "sixteen arpents front along the Mississippi, *to be taken from the descent of the road into the creek*, which is the same front of petitioner's land."—(Rec., p. 35.) But in the survey made April 10, 1799, as the surveyor says, "*in the*

presence of the proprietor," instead of making his own front the basis of the survey, (see plat, p. 68,) he slides it off four arpents S. E., so as to cover the whole of Brazeau's reservation, and in his petition for confirmation, of September 3, 1806, (p. 37–38, and 138,) he attempts to get clear of Brazeau's reservation by abandonment, and claiming the whole as an original concession to himself. The board, however, on the 22d of September, 1810, confirmed to Brazeau the four apents, according to the reservation in his deed to Labaume, and on the 14th of June, 1811, issued to him a patent certificate, according to the said reservation (Rec., pp. 38–39); whereupon, on the 26th of July, 1816, Brazeau conveyed to Pierre Chouteau.—(Rec., p. 39–40.)

No one, I think, can doubt that the inceptive title to the four by four arpents of land situated as above shown, passed by the proceedings above considered to Chouteau. It is said, however, that the commission acted without authority in the confirmation to Brazeau. I do not perceive the force of this objection. The authority of the Board has been acknowledged and its action sustained by the Executive Department whenever the question has come before it; and it were difficult to find a reason against it, if it were a question *de novo*. These four by four arpents were never confirmed to Lebaume—they are not patented to him, but reserved to the person having "*a valid adverse right thereto.*"—(Record, p. 72.)

The original right being proved in Brazeau, the defendants set up title, *by possession*, in Lebaume. This hardly merits discussion. The *title* was, and continued to be, in the United States until March 25, 1852, (Rec., p. 76,) when it was patented to Lebaume. Until then, there could be no rights acquired *by possession*, either against the United States, or against parties for whom the United States held *in trust*. Possession, therefore, down to this time, is absolutely worthless, except in so far as it amounts to an assertion of right on the one side, and admission on the

other. Indeed it cannot amount to admission, as the party entitled could not maintain a possessory action until he received his title from the United States. But proof of possession, by Lebaume, and those holding under him, with claim of title, is wanting. I will briefly examine it.

Brazeau, and Chouteau under him, are shown, beyond doubt, to have had the original concession, and the confirmation of the commissioners, in the four by four arpents. When, and by what process, did the right pass from them to Lebaume? Certainly not at an early day, for in November, in 1817, Lebaume set up no title to, or interest in, it by possession or otherwise. At that time the confirmation of the commissioners had been had, giving to Lebaume the four by sixteen arpents, commencing at the descent of the road into the Rocky branch, and giving to Brazeau the four by four arpents now in controversy. Lebaume set up no claim to the four by four arpents, but asked for a survey of the whole four by twenty arpents, pursuant to the confirmation, which survey was made by Brown, under Lebaume's instructions.—(Record, p. 40, and Plat.) A return of this survey was made on the 24th of October, 1832, to the Recorder of Land Titles, who refused to recommend the issue of a patent thereon, because it contained two in one.—(Doc. H., Rec., p. 81, Conway's Report.)

Conway, in his testimony, says of it, (page 90,) "I had very little conversation with Col. Chambers when I refused to issue patent certificate." (The certificate had issued.) "Didn't say much." "He made no remark that made any impression on my mind, except that he had no objection to a resurvey. He only wanted his patent." It is evident that Chambers was satisfied with the patent certificates 982 and 983, under which he was asking for a patent. At these dates, October 24th, 1832, and May 2d, 1833, Chambers set up no claim to the four by four arpents, either by original right or by possession.

Lebaume had taken liberties with the *concession to himself*, by sliding the back line four arpents south of its true position, perhaps not with the purpose of stealing Brazeau's reservation, but evidently with the purpose of getting better back land.—(Plat, p. 72, and Concession, p. 35.) Having moved his concession south, it was necessary to run the south ditch just where he did run it, in order to drain the back land, and make a discharge for the western ditch.—(Plat, page 124, shows the western ditch; Plat, page 138, the lay of the land, with a view to drainage; and Plat, at p. 310, may be consulted as explanatory.) So far, down to May 2, 1833, all claim of title, on the part of Chambers, is negatived, and the fact of the drain, or ditch, explained, without touching title, or a claim of title, in any one. It was simply the opening of a necessary drain in the only place where it could be conveniently opened. There is some conflict as to possession, and assertion of title, in the parol evidence, but the weight of it is very much against such possession, especially with assertion of title. It was somewhere between May 2d, 1833, and the 14th December, 1837, (Record, 81, Plat, p. 124,) that Chambers set about thimble-rigging Brazeau out of the four by four arpents, by throwing it off to the west side of the tract, and making himself the owner of the entire original concession.—(Plat, p. 138 and 96.) As to this, there is a good deal of loose, conflicting testimony, but nothing to raise a doubt as to correctness of the conclusions to which I have come.

Conway, in his testimony, page 88, says:

"I resided generally in St. Louis, since November, 1818"—"passed the mound often, and rode up into it when I first came into the country. I recollect the *west* ditch, but don't recollect then to have noticed the *south* ditch." Again, he says, (page 91): "I have frequently been at Major Christy's house. The road leading to his house ran close to the mound, and then descended the hill near to the river, and then ran along up east of the

house. *I never noticed the south ditch in going to Christy's house.*"—(See Plats, p. 96 and p. 310.) And again, p. 92, he says: "Maj. Christy was in possession, and the only one I know of in possession of any part of the tract between the ditches. I don't know whether he claimed to the *south* ditch or not." If there had been a fence along the south ditch witness would have known it, as his road from the mound to Maj. Christy's crossed the ditch, and went up along the margin of the river.

M. L. Clark says (p. 92): "I was commissioner to make partition of Wright's estate in about 1840; *before that time there was no fence on the southwest part of the Lebaume tract.* I saw Colonel Chambers a short time before it was known he was dead; about five or six years ago. I saw him about the house from my earliest recollection up to a short time before his death; he was then exercising ownership when he divided Wright's estate in about 1840."

Some of the witnesses speak of Chambers as being in possession of the land between the upper and lower ditches. They do not seem to comprehend that there were two tracts with different owners. Chambers owned three-fourths, Chouteau one-fourth, and I have already shown that Chambers, down to 1837 or 1840, did not pretend to be in possession of any part of Chouteau's one-fourth.

If we go back to Brown's survey of 1817 (Record, p. 72) we find Chambers well in his own bounds. Brown finds and notes a stone house just below the southern ditch. He next notes a steam saw-mill 17 ch. and 28 links from the southern ditch, and the plat (p. 310) shows his group of houses, outhouses, and improvements well in his own land. There is a clause in Cozens' testimony (Record, p. 123) by which it is supposed possession is proved. He collected rents for Chambers in 1840 "for about a month." "In that time Chambers had four or five tenants on *that place.*" He does not de-

fine *what place*, other than "*about the old brewery*," and on the tract at large, and there is no fixed locality for "*the old brewery.*" That also is quite at large, like the rest of the improvements, unless it be Mullenphy's, south of the south ditch. There is a tan-yard lot spoken of by John K. Walker (p. 196), on which a saw-mill was built in 1845, bringing everything like definite assertion of title down to the time of actual armed controversy for possession. Cozens surveyed for Chambers, *west of Broadway, in* 1840, (entirely west of the Brazeau tract,) "and at the river in 1841," (p. 123.) In 1825 Samuel L. Lapsley proposed to buy of Chambers two lots on the river, within this tract. Chambers tells him they are not for sale, but "if any lots some distance from the river" will answer the purpose he will sell on favorable terms; or he will rent one and two, which are within the tract, *with the privilege of removing temporary buildings*, (193–4.) The translation of which is that he had no right to the land asked for, but was willing to get possession if he could through a stranger; and he sold Neil Walker a lot entirely west of the Brazeau tract, (pp. 198, 199 and Hyer's Map, p. 96,) which, in cursorily reading the testimony, would be supposed to be in the four by four arpent tract.

The amount of evidence of possession and claim of title on the part of Chambers is this: He set up no pretence of right till 1837, when he got the survey setting off Brazeau's four by four arpents on the west (Hyer's plat, p. 96,) confirmed by an oversight of the Surveyor General, (p. 91,) and it was not till 1841, as shown above, that he ventured to assert a claim to any part of it.

T. C. Hoyt's testimony (197) ranges from 1842 to 1846, and of course has nothing to do with title by possession. Indeed, the improvements, as they are called, were, in 1846, miserable shanties—nuisances on the ground, which Chambers had allowed to be built there in order to set up a colorable possession, (see testimony of J. J. Childs, pp. 203, 205,) and all evidence of possession, with claim

of title prior to 1837, is rebutted by witnesses and contradicted by the official claims and acts of the defendants.

Besides, as I have already urged, there could grow up no title by possession as against the United States, who held the legal title, (Lindley vs. Miller, 6 Peters, 673,) nor against Brazeau, who for want of the legal title could not maintain his possessory action, unless turned out by forcible trespass. The right, therefore, had not yet left Brazeau and his assignee, Chouteau, and gone to Lebaume and Chambers. About this date the fierce strife for possession began. Chambers had his survey, throwing the four by four arpents more than a mile to the northwest, (p. 68, map,) nowhere approaching a single line or corner which belonged to it, quite out of sight and sound of the "*Grange de Terre*" and the bank of the Mississippi, and though he had it by an avowed mistake of the public officer, he determined to maintain it, and just at this juncture of time the present plaintiff, the lawful owner of the interest under Brazeau, asserted his rights, and the possession became a question of physical force. On this I will not stop to comment. The court will find it in full from 200 to 222 of the record. I deem it of no importance to the very right of the case that the defendants were able to bring and maintain an overwhelming force of armed men on the ground, or that they succeeded in compelling the plaintiff to retire from the contest by burning his buildings, by erecting barricades against him, and by threats of personal violence. All we claim is, that on the final adjudication here, where legal rights are at issue, the race is not to the swift, nor the battle to the strong. He who had the right might commit violence in asserting it, without thereby forfeiting his right, but he who had not the right, could not acquire it by high-handed and successful violence.

I have shown above that the right of property, as far down as 1837, was in those claiming under Brazeau, through Chouteau. The plaintiff, Magwire, holds under

Chouteau by title regularly derived, which I will leave to my colleague to maintain, if it be attacked in any point, and proceed to consider the other remaining questions in the case.

I have, I think, shown conclusively that in the year 1841 the legal title to the four by four arpents was in the United States. All the individual right that existed in it was in the plaintiff, Magwire, who claimed it as remote assignee of Brazeau. The ground was vacant, except a few shanties built by squatters (pp. 203, 205) upon it, and Chambers had a survey including it in his large tract, on which survey was issued, May 1, 1841, a patent certificate under a mistake by the Surveyor General, and a patent refused on account of irregularities.—(Rec., pp. 74, 75, and 76.)

Thereupon Conway, Surveyor General of St. Louis, was called upon by the Commissioner of the General Land Office (March 11, 1847) for a report on the condition of the title and the rights of parties therein, (pp. 76, 77,) which report, so far as relates to the Lebaume and Brazeau claims, will be found on pages 79, 80, and 81 of the record. It contains a simple statement of the facts, and the necessary legal conclusions thereon, and cannot fail to satisfy any man familiar with the subject, as to location and title.

At what time Chambers finally succeeded in driving Magwire from the land in controversy does not distinctly appear on the record, nor is it important, as his expulsion and the burning of his mill gave naked possession but no legal title to Chambers; and down to this time the reports and opinions of the Land Office were all against him. Nor does it appear how the question of right got up from the General Land Office into the department proper. It seems to have been, and probably was, by appeal in 1849; but it does not appear to have been moved in till 1851, and, evidently, with good reason; for during those two years the secretaries, who would have

had cognizance of those cases—first, the Secretary of the Treasury, and then the Secretary of the Interior—were both land lawyers, both familiar with Spanish titles; on neither of whom could have been palmed, by any skill or artifice, a specimen of land piracy as open and impudent as this.

When Secretary Stuart came into the department, in 1851, Mr. Chambers' claim to the four by four arpents was taken up and disposed of without notice to the adverse party, the actual owner, and no one was present to represent him. The secretary's opinion, from page 223 to 230 of the record, read in connection with the maps and testimony, will satisfy your honors that the head of a department, who happens to be wholly ignorant of a class of titles and incapable of understanding them, is not a safe tribunal to hear and decide, judicially, in the last resort upon important rights of parties.

It is quite safe to say that legal titles are better tried in our courts of justice, where both parties can be heard, and where the rules of law are regarded, at any rate, and that is enough for our case; the law does not make, nor has any decision of this court yet made, such blunder of a secretary conclusive and irreversible by his successor or by this court.

If Secretary Stuart had examined this case at all, he could not have suffered such opinion to be entered of record with the evidence in the case, and the only way in which his action can be accounted for is, that he suffered Chambers' counsel to draw up the opinion, and, in his profound ignorance, signed it without examination. The objection to this hypothesis is, that it would require counsel of much more than ordinary moral courage to draw up, with this evidence before him, such an opinion in behalf of his client even though he knew it would be signed without reading or examination. That all this was done in the absence of Brazeau's representative, and a location attempted to be forced upon him

destructive of his whole title, is apparent on the face of the record. When the facts came to the knowledge of Magwire, he at once formally protested against it, and demanded that the patent to him (Brazeau's representative) be withdrawn and canceled.—(Rec., p. 107, Jan. 22, 1852. Letter from Thomas A. Hendricks, commissioner, to the Secretary of the Interior, and further correspondence, pp. 109, 110.)

Thereupon the secretary, the successor of Stuart, recalled the patent as issued improvidently, (p. 110,) and in this he was met by the fierce and bitter denunciation of the land-pirate, who fancied he had secure possession of his neighbor's property. They could and did procure for and give to Chambers a patent for Magwire's land, but could not compel Magwire to accept, nor could they, though they attempted to accept for him the patent which they had procured to be issued, and which they tried to force upon him.—(On this point see Record, pp. 153, 312, 313.) The defendants constructed this Ricot—a man of straw, whom they characterized as a legal representative of Brazeau, and in his name demanded the patent; but they have wholly failed to show his right to represent Brazeau in this or anything else. It is, indeed, clear that this claim was set up in bad faith—to destroy, not to sustain the right of Brazeau to anything—in the expressive language of our aborigines, "to wipe him out." An examination of Esther's concession (Mr. Glover's brief from page to page) will show this most conclusively. It is an attempt to cast him off from a tract which the record shows to have been his, on to one where he has, conclusively, no pretence or color of claim. It is done in the interest of the adverse party.

But suppose they had the patent, it was no better than waste paper in their hands. It has bee rejected by Magwire, an undoubted representative of Brazeau; it has been recalled by the department as improvidently issued;

it can affect the interest of no one who has refused to accept it. But the patent to Lebaume including Brazeau's reservation, conferred on him the legal title to the tract of four by four arpents, which no one could successfully controvert without a like transfer to himself of title by the United States. For this reason John Magwire, the present plaintiff, failed in his action against Mary L. Tyler, the present defendant, in this court, December term, 1860. Magwire had no authorized subsisting survey, and no patent; his claim was still *sub judice* in the Executive Department.

The patent to Lebaume (p. 72) contains the following saving, which indeed the rules of law attach to it whether expressed or not, namely, "*saving and reserving any valid adverse right which may exist to any part thereof.*" On the failure of Magwire in his action at law against Mary L. Tyler, in 1860, for want of a patent, he applied to the General Land Office, and through it to the department, for a re-survey defining his valid adverse right, secured as above, and for a patent according thereto, which was finally issued on the 10th of June, 1862.—(See Rec., pp. 53, 54, and 55.)

Magwire having thus the younger *patent*, with the *older*, indeed the *sole and only equity*, is now before your honors to demand his rights pursuant to the usages of this court, and the saving in Lebaume's patent.

It were idle to cite cases in support of settled legal doctrine. The law on this subject is distinctly laid down in Barry vs. Gamble, 3 Peters, 55, 56. We, having the younger patent and the better equity, are entitled to the decree we ask. It is claimed, however, that we are barred by the judgment of 1860. *That* trial was had, and judgment pronounced in a different case. An action, founded on an equitable right, which this court could not recognize. Our action here is in equity, supported by the legal title, from which we ask the removal

of an obstruction. It is well settled that we had in that case no standing in court, and could not contest the defendant's title. The practice of this court could not be altered by state law so as to authorize the equitable owner to bring ejectment.—(Clark vs. Smith, 13 Peters, 202, 203; Landis vs. Brandt, 10 How., 370.) Nor could this court recognize our right until the department gave him title. But it is contended that the whole proceeding of survey and patent to Brazeau's representative in 1862 is void, for the reason that the department cannot correct its own errors, no matter how gross, and that this court cannot overrule or correct an erroneous decision of the department; that such error, once committed, is absolutely and forever conclusive of the rights of parties. I am wholly at a loss to trace this extravagant claim of judicial power to any legitimate source. It is not in the Constitution. On the contrary, that instrument vests the supreme judicial power in this court. It is not in the law, which simply directs the executive action of the land officers, the department, and the President, in case of these titles, subject to certain rules calculated to promote justice and protect private right, in which, if they err, it would seem that their errors, like all others, ought to be corrected, and private right guarded by the high judicial action of this court. And if the Executive could not correct its own error, having committed one, even to the issuance of the patent, there could be no such thing as a *younger patent* with the *superior equity*—a case familiar in law, arising from numerous executive mistakes and corrections of former errors. The Executive having expended his power by issuing to different contending parties the same legal title, it remains the province of this court to find and pronounce the superior equity.

Viewed as a matter of principle, there is nothing in the construction of the Executive Department, as a judicial tribunal, which ought, if it were possible, to give its decisions the fixed and ever-durable sanctity which is claimed

for them. This case illustrates the adaptation of those departments to judicial investigation, and would not, I think, incline the court to impute to them the high and ever-during sanctity claimed for them by defendants, even if the court had the power to impute it, which it clearly has not. This court cannot restrict an executive department in the re-examination of its acts and the correction of its errors, and it can surrender none of its own powers or duties to an executive department; and this is not a propitious case in which to propose such transfer. The Executive Department having disposed of the case so far as it is in the reach of executive action, has left it in the power of the judiciary, which is fully authorized by Constitution and law, and fully competent to dispose of it according to right and justice, where an open, public hearing is had, and the claims of parties duly discussed and considered.

T. EWING,
For Plaintiff.

Supreme Court of the United States.

No. 253.—December Term, 1867.

JOHN MAGWIRE, *Plaintiff in Error*,

vs.

MARY L. TYLER, and many others, *Defendants in Error*.

Brief for Defendants in Error, on motion to dismiss the writ of error sued out from this court to the Supreme Court of Missouri, for want of jurisdiction.

BRITTON A. HILL,
Of Counsel for Def'ts in Error.

STATEMENT OF CASE.

Both parties claim under patents from the United States, and the plaintiff, Magwire, insisted that the true boundaries of the defendants' patent and confirmation, did not include the land covered by the plaintiff's junior patent and confirmation. The State Court held that the true boundaries of defendants' confirmation and patent did cover and include the land covered by plaintiff's junior patent. The whole controversy raised by the plaintiff, turned upon the qnestion of the true boundaries of [illegible] and confirmations under which the

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The plaintiff filed his petition in equity in a state court of Missouri, in September, 1862, as junior patentee under

9 How 408
Ruth v. Wadley.

one Brazeau, patent dated the 10th June, 1862, (Rec., p. 54) to devest the title of the defendants under a senior patent to one Labeaume, dated the 25th of March, 1852, issued on a Spanish survey of 1799, under a confirmation of September 1810, upon a claim by Labeaume, recorded the 26th of February, 1806, supported by a possession, with substantial enclosures, mansion house and outbuildings, from 1798 to this day.—(Rec., pp. 36, 37, 38, 69, 102, 268 to 272.)

The plaintiff's petition sets forth four leading facts to establish his equity.

1st. That Soulard made the Spanish survey of 1799 for Labeaume, so as to include, by mistake or design, the Brazeau reservation, giving plaintiff an equitable claim to relief in a court of equity.

2d. That the confirmations of 1810, to Labeaume and to Brazeau, were so made as to include the Brazeau reservation within Soulard's survey.

3d. That the Brazeau reservation is properly to be located within the Soulard survey, from the boundaries, relative position, and location of the surrounding tracts.

4th. That the defendants and their grantors claiming under Labeaume were not innocent purchasers, that they had notice of the reservation being within the Soulard survey for Labeaume, and confederated with the United States officers to procure the patent to Labeaume, so as to include Brazeau's reservation, and that this patent is a cloud upon the title of plaintiff, which a court of equity ought to remove.—(Rec., p. 3 to 8.)

The answer of defendants denied all the equities claimed, and denied all the material allegations concerning the supposed fraud or mistake in the location of the reservation within the Soulard survey of 1799, and set up, as independent defences, the following:

1st. That the plaintiff is barred from recovering this land by estoppel; a boundary line having been established between Labeaume, under whom defendants claim, and

Chouteau, under whom plaintiff claims, in the year 1799, and recognized and acquiesced in for more than twenty years thereafter, thus vesting the title according to the line so established by force of the mutual possession in accordance with that line.

2d. That defendants and their grantors have had and held, open, notorious, and continuous possession of the premises sued for, from 1798 until 1862, claiming to own the same, adversely to all other persons.

3d. That defendants and their grantors are innocent and bona fide purchasers for full value, of all the land in Soulard's survey, before any United States survey had been made of the confirmation to Labeaume, and without any notice of the pretended equities set up by plaintiff in this suit half a century afterwards. See deed of Labeaume to Wm. Chambers, of 1816, for all the land in Soulard's survey of 1799, with full covenants of seizin, of warranty, and against encumbrances.—(Rec., p. 102.)

4th. That the land claimed by the plaintiff, under the patent of 1862, had been granted to defendants in 1852, by an elder patent from the United States, in strict conformity with the acts of Cangress.

5th. That the Brazeau reservation claimed by plaintiff was created by the deed of Brazeau to Labeaume, in May, 1798, and is located at the north foot of the Big Mound, in St. Louis, and not within Soulard's survey, as claimed by plaintiff.

6th. That all the equities, claims, and pretences, now set up by the plaintiff, and many valid defences not necessary to the defeat of this champertous suit, were set up, insisted upon, and adjudicated in favor of the defendants, in a former suit in equity between the same parties, and privies, and in regard to the same subject matter.—(See 1 Black, *Magwire vs. Tyler*, p. 198.)

7th. That the junior patent to Brazeau was void as against the elder patent to Labeaume, for two reasons:

1st. Because the government having duly granted the

land to Labeaume in 1852, could not grant the same land to Brazeau in 1862.

2d. Because the confirmation to Brazeau was made in direct violation of the 4th sec. of the act of 3d March, 1805, no notice of claim by Brazeau having been filed with the recorder of land titles, as required by law.—(2 vol., L. and B. Laws of U. S., p. 326.)

8th. That plaintiff was barred from asserting any equities in this case, by reason of the lapse of more than half a century after the alleged equity arose under the confirmation of 1810.

9th. That the deeds under which plaintiff claims the land, known as the Brazeau reservation, do not in any respect describe or convey the land in suit, but other and different land. See deed from Brazeau to Chouteau, of 1816, (Rec., p. 39,) and protest of Pierre Chouteau, 26 May, 1826, locating the reservation south of Soulard's survey for Labaume, and at the foot of the Mound.—(Rec., p. 108.)

10th. That in 1852 a patent was issued to Brazeau for the reservation south of Soulard's survey for Labeaume, and at the foot of the Mound, and that the plaintiff sold and conveyed said land to Lewis V. Bogy (Rec., p. 156; 240); that Bogy afterwards sold and conveyed by quit claim to the plaintiff the reservation, as land lying within Soulard's survey for Labeaume (Rec., p. 315); so that plaintiff and his grantees claim title to the land known as Brazeau's reservation, under two patents, one of 1852, south of the Soulard survey, at the foot of the Mound, and the other of 1862, now in suit, within Soulard's survey for Labeaume.—(See ans., Rec., p. 10 to 26.)

All the evidence and testimony given on the hearing of the first suit in equity, in the case of *Maguire vs. Tyler et al.*, 1 Black., 198, was given on the hearing of this second suit in equity, between the same parties and privies, and in regard to the same subject-matter.—(See Rec., p. 243 to 308.)

The Supreme Court of Missouri, in this case, entered a judgment for the defendants, dismissing the plaintiff's suit, with costs.—(Rec., p. 350.)

The plaintiff thereupon sued out a writ of error to reverse the judgment of the Supreme Court of Missouri, and the defendants have filed their motion to dismiss the writ of error.

The Supreme Court of Missouri delivered the following opinion in this case, the report of which in the 40th volume of the Missouri Reports has not yet been published. I print this decision at the request of the counsel for Magwire.

SUPREME COURT OF MISSOURI, No. 29, of March Term, 1867.—JOHN MAGWIRE, Plaintiff, Respondent, *vs.* MARY L. TYLER AND OTHERS, Defendants, Appellants.

OPINION OF THE COURT BY JUSTICE NATHANIEL HOLMES.

This is a suit in the nature of a bill in equity, filed in the St. Louis Land Court, in 1862, and removed by change of venue to the St. Louis Court of Common Pleas, praying the Court to divest out of the defendants, all the right, title, and interest acquired by them in the tract of land therein described, and to vest the same in the plaintiff, and put him in possession; and that an account might be taken of the rents and profits.

The petition sets forth the history of the plaintiff's title from its origin under the Spanish Government to its final completion in a patent from the United States, in 1862.

The answer, in like manner, states the main facts in the history of the defendants' title from its origin under the former government to its final perfection in a patent, in 1852. Both patents include the land in controversy.

The grounds of equity stated in the petition are essentially these: 1st, That the plaintiff has the better equity, and that the land justly belongs to him. 2d, That there was fraud on the part of the defendants or their ancestors, in procuring a survey, and patent to them for this land. 3d, That the defendants' patent is a cloud upon his better title; of all which the defendants had notice.

The answer denies these equities and claims that defendants have the prior title and the better equity, pleads in bar a final decree in chancery in a former suit between the same parties, upon the same identical equities, and insists that the plaintiff's suit is barred by the great lapse of time.

The plaintiff obtained a decree that the title to said tract of land be divested out of the defendants and vested in the plaintiff and his heir, and for rents and profits amounting to some $20,000, and the case comes up by appeal. The whole case may be determined on a few essential points, without any necessity that we should discuss at large the immense array of facts, and matters, which are accumulated in the record, and which have been made the subject of elaborate argument, on both sides, and been fully considered by the Court. There are two patents for the same land; on the patents only there can be no question, but that the oldest patent conveys the absolute title from the United States, and consequently, if there were nothing more, the junior patent must be ineffectual and void, for the reason that the grantor at the date of the patent was not the owner of the land, and had nothing to convey.—(Polk's Lessee vs. Wendell, 9 Crauch, 99; Stoddards vs. Chambers, 2 How, U. S., 318.) The plaintiff, therefore, must claim, as he does, to go behind the patent into the history of the respective titles, in order to gain a prior or better equity. The patents, respectively, related back to the first or inceptive act, in the series of concurent acts, which are necessary under the laws of the United States to complete the conveyance. It has been decided and may be considered as settled, that, under the acts of Congress on which those titles depend, the patent relates to the date of the filing of the claim.—(Landes vs. Brant, 10 How. U. S., 373 Mitchell vs. Handfield, 33 Mo., 438.) Under this rule the defendants' elder patent relates to the 26th day of February, 1806, (when Labeaum filed his claim) and vests an absolute title as of that date.

The plaintiff's junior patent cannot relate to any date prior to that of the confirmation to Brazeau, on the 22d day of September, 1810, for the reason that the record furnishes no evidence of an earlier date than that for the filing of his claim. On that day the Board of Commissioners takes notice of his claim and confirms it.

It does not appear that any claim had been filed or presented to the Board, nor that any evidence of claim had been recorded, at any named date, in the name of Brazeau. If we could presume, upon the facts of a confirmation appearing of that date, that all prior acts had been rightly done, there would still be no earlier date of the first act, to which the patent could be made to relate. The confirmation stands alone as the only inceptive act to which the fiction of relation can be applied in favor of this claim.

These first acts are the earliest equities that exist in favor of the parties, and against the government, of which a court of justice can take notice. They are the inception of the titles, as emanating from the United States. Prior to such inception there existed nothing but the unconfirmed claim or inchoate Spanish title by concession or survey; and this was nothing more than an equity addressed to the political power under the obligation of the treaty. It has uniformly been held that where two conflicting equities of this nature have been acted upon by the government, and one of them recognized to the exclusion of the other, there was an end of the matter in the Courts at Law or in Equity. The decision of the Government is conclusive respecting the comparative merits of such inchoate claims. So far, then, the defendants have the prior title, and the superior equity. There is no evidence in the record, other than the confirmation, (and the certificate following upon it,) that either Brazeau, or Chouteau, his assignee, had made any claim before the Board.

The Commissioners appear to have acted upon the evidences, which were filed and produced by Labeaume in support of his own claim. They confirmed the claim of Labeaume upon those evidences, among which were a concession, a recorded Spanish survey, and proofs of an actual possession under them for many years, and the confirmation was to be surveyed mainly upon the *data* given in those evidences.

At the same time they confirmed "the four arpents" to Brazeau, agreeably to his reservation in the deed to Lebeaume (which, together with the petition and concession to Brazeau of the tract of four by twenty arpents, was before them), and upon no other evidence that ap-

pears; and this confirmation was to be located and surveyed upon the evidences of the reservation as made.

There is nothing to show that the Board thought of confirming the same land to both parties. They had no power to do so. If the claims had been made for the same land, or conflicting evidences of right, it would have been their function, and their duty, to decide between them, and to confirm the one, and reject the other. This was certainly not done; they confirmed both. Now, that the claim of Labeaume, upon the evidence produced by him, included this land, there would seem to be no room for any rational doubt. The only evidence before the Board, relating to the claim of Brazeau, was the petition, concession and deed of Brazeau, which Labaume had filed as a part of his own evidence, conveying to him the sixteen arpents of the length of the concession to Brazeau, in which deed only the reservation by Brazeau was mentioned, to consist of four arpents of the twenty in length of the whole concession, "to be taken at the foot of the hillock in the southern part of said land," which land, according to the petition, was "situate beyond the foot of the mound," and was to begin at the "foot of the hill," on which the mound stood, and by the concession was to "begin beyond the mound," "and extend north, northwest to the environs of Rocky Branch," and of which an end was to be bounded by the concession of Esther, which had no more fixed and definite location than had the concession to Brazeau.

It appears that the land thus reserved was sold by Brazeau to Chouteau. Neither Brazeau or Chouteau had any possession of any land within the area of Labaume's claim, as presented and confirmed. No evidence of the sale to Chouteau, nor any survey, or possession, or claim of either of them, appears to have been filed by anybody, nor produced before the Board, in support of a claim for Brazeau. There is no reliable evidence whatever that the Board intended to confirm to Brazeau any land within the area of Labeaume's claim and possession.

His claim was evidently confirmed to be surveyed elsewhere.

Therefore, if relation were to be had for both patents to the date of the confirmation only, thus making them equal in time, the plaintiff could gain nothing in respect to any superior inceptive equity to this land.

The defendants still hold that ancient possession, as before, and there would be no ground here, either at law or in equity, on which the plaintiff could be entitled to relief. Now, to the dispossession of the defendants.

Both claims were confirmed to be surveyed. The plaintiff proceeds upon the theory, not that the same land was confirmed to both claimants, but that the four by four arpents were confirmed to Brazeau to be surveyed out of Labeaume's claim, and without the area of Soulard's survey, and that only the remainder of the claim was confirmed to Labeaume. This whole matter becomes, essentially, a question of the location of the confirmations which were made to be located by survey on the evidences relating to them respectively. Labeaume's asserted claim was confirmed to him; though the entry in the proceedings of the Board names a different number of arpents as the contents. The reservation of Brazeau was confirmed to him.

It necessarily follows, that, if the confirmation to Brazeau is to fall upon the same land as that of Labeaume, it must be the result of location and survey.

The larger part of the proofs, and much of the argument, was directed to this subject, and really to the question of the true location of the reservation made by Brazeau; and though not deemed absolutely necessary for the decision of the cause, it may be proper to say, that we are impressed with the justness of the conclusion of Napton, J., in Magwire vs. Tyler, (25 Mo., 433,) that this whole controversy "is purely one of locality," that "pursuing it through all its ramifications, and looking at it in all its diversified shapes, it still resolves itself into this, and nothing else," and that "the United States Surveyor is alone to determine this question," subject only to the revision of his superior officers of the Land Office. Now, the head of the Land Department had first finally determined this question in favor of the defendants, and given them the survey on which the elder patent issued, and that survey has never been set aside or annulled, nor can it ever be annulled.—(United States vs. Stone, 2 Wallace U. S., 525.)

We concur also in the opinion of Mr. Justice Catron, in West vs. Cochran, (17 How. U. S., 411,) that the entry of the confirmation of Brazeau in the records of the

Board "is so confused as to be unmeaning without reference to the title papers of record," and also, (as we may add,) to the deed from Brazeau to Chouteau (which was not before the Board) in which Brazeau himself recites more distinctly what land he had intended by that reservation.

We agree also with his opinion in Magwire vs. Tyler, (1 Black., 199,) that this confirmation to Brazeau (if ever to be surveyed at all) was to be surveyed conformably to the reservation, and that "that reservation was at the foot of the mound." No competent surveyor, we think, could properly locate it otherwise than in conformity with this fixed landmark and controlling call. Nor could any competent surveyor, upon the whole given *data* relating to the location and boundaries of the confirmation to Labaume, properly survey it otherwise than so as to exclude the Brazeau reservation from within the limits of his claim, as actually possessed under the Spanish survey, and as presented to the Board and finally confirmed.

But the executive officers have settled this matter of location, and it is no longer open to judicial inquiry; nor, if it would be considered open under any special circumstances (of which no supposable example occurs to us), for a consideration of equities, have we found any satisfactory evidence of a superior equity in this matter in favor of the plaintiff.

As bearing upon any supposed equity grounded upon fraud or mistake, a patient consideration of the whole history of the origin and progress of these titles has resulted in a thorough conviction, that all the fraud or mistake there has been concerning it, arose from that same "confused" entry, and that the idea of locating Brazeau's reservation within the areas of Soulard's survey for Labaume, has never been anything else than an unfortunate blunder.

As regarding the inceptive rights to which the patents relate, for the purpose of ascertaining the priority of title as between the two patents issued upon different inceptive equities, the whole matter falls within the jurisdiction of a court of law; and in that there is no need of invoking the aid of equity.—(Boer vs. Borland, 13 Peters, 564; Landes vs. Brant, 10 How. U. S., 373; French vs. Spencer, 21 How. U. S., 228.)

When the controversy has arisen between two con-

flicting inceptive rights only, before a patent has issued to either party, or where one party stands on a prior inceptive equity, and the other on a junior equity and a patent, courts of equity have taken jurisdiction to protect the better equity, which had emanated from the government. There are many cases of this kind concerning entries, pre-emption rights, and New Madrid locations, when the party stands in the position of a purchaser from the United States, for a valuable consideration paid. Even a right to have an entry by pre-emption, where no money had, as yet, been actually paid, has been so protected as a "legal right," acquired under the acts of Congress. Such parties may be entitled to relief, against other persons, than the government itself, on the ground of fraud, or preventing a cloud upon a title, or multiplicity of suits, or injurious and unauthorized acts of public officers, or upon any other ground of ordinary chancery jurisdiction.—(Garland vs. Wynn, 20 How. U. S., 6; Barnard vs. Ashley, 18 How., U. S., 44; United States vs. Hughes, 11 How. U. S., 567; Carroll vs. Stafford, 3 How., U. S., 441; Boaley vs. Taylor, 5 Cranch, 191; Taylor vs. Brown, 5 Cranch, 243; Huntsucker vs. Clark, 12 Mo., 337; Berthold vs. McDonald, 24 Mo., 131.)

Courts of equity in this State exercise jurisdiction according to the principles of equity jurisprudence—excepting only as the same may have been modified by some special statute.

Equities addressed to the political power do not fall within the scope of this jurisprudence any more than merely natural equities. There is really no case made on the record which can entitle the plaintiff to relief under any head of equity jurisdiction. The grounds of equity that are specially alleged in the petition consist, first, in a supposed priority of inceptive right; second, in the alleged fraud on the part of the defendants or their ancestors, which, so far as appears, consisted mainly in a diligent prosecution of their claim before the several officers of the Land Department, resulting in a survey and patent to them for the land claimed, including the premises in dispute, in respect of which we will find no proof of any fraud; and, third, in a supposed cloud upon the plaintiff's title so created.

The matter of the inceptive right has already been sufficiently disposed of. The fraud alleged does not con-

cern any contracts, relations, privities, obligations, trusts, agencies, or any transactions or conduct whatever, arising between the parties, respecting any right, title, or property, which had emanated from the United States, and in respect of which the plaintiff had acquired any prior or superior equity. Throughout the history of these claims the contending parties appear to have acted independently of each other, and pursued a separate struggle, to obtain the complete evidences of their respective titles, with conflicting pretensions, since the date of the confirmations, so far, at least, as any adverse claims to this same land have ever existed or been pretended. All such equities as may have existed in favor of either of the claimants under the former Government and prior to the presentation of their claims for confirmation under the acts of Congress must be considered as merged and included in the equity or justice of the claims which were submitted to the action of the political power.

And there is really no such thing in the case as what is meant in law by a cloud upon one's title. In one sense there is, indeed, a very heavy cloud, and not a cloud merely, but a thunderbolt of annihilation upon the opposing title.

Still further, this Board had a limited and special jurisdiction only, and no more power than the act of Congress conferred upon them. They had power "to hear and decide, in a summary manner, all matters respecting such claims" as had been filled upon "notice in writing," and been possessed or surveyed as required by the act of Congress, and of which the evidences had been delivered to the recorder "for the purpose of being recorded," and upon no other claims of this class.—(Act of Congress of March 2d, 1805; 2 United States Statutes, page 326.) (Act of Congress of March 3d, 1807, s. 7.)

In such case all the facts must appear which are necessary to give jurisdiction, and show that the tribunal had authority to act and determine. It appears that the Board, *ex mero motu*, confirmed a claim for Brazeau, of which no notice in writing had been given, of which no possession nor survey had been proved, and of which the evidences had neither been filed nor recorded, and were not produced by any one in the name of Brazeau.

We must hold that they had no jurisdiction; no power to act upon such a claim, and that the confirmation to

Brazeau was a nullity. The plaintiff's patent is, therefore, null and void, both in its inception and its completion.—(Grginon vs. Astor, 2 How. U. S., 341; Chouteau vs. Eckhart, 2 How. U. S., 374; Bissell vs. Penrose, 8 How. U. S., 388; Landes vs. Perkins, 12 Mo., 255; Patterson vs. Fagan, 37 Mo., 81.)

The plaintiff's survey shares the fate of his title, and must fall with it, whether that title fails for the reason that the land had been previously surveyed and patented to another upon a prior inceptive right, or upon the ground that it was void in its inception.

If the plaintiff had shown a foundation for equitable relief under any recognized head of equity jurisprudence, it would not matter whether he had the legal title to this land or not. One legal title is enough. In such case the Court would decree the title to be conveyed to him or to be vested in him by decree. His equity alone would be his sufficient title to relief.

The former decree in Chancery between these parties proceeded upon the same substantal facts and grounds of equity that are here alleged again. The only essential differences that are insisted upon now, are, that when the former cause was litigated, the official survey and patent had located the plaintiff's claims in another place, and that he has now a formal title, by patent to this land, which he did not have then. This may be true, but it cannot change his situation in reference to any equities upon which he might be entitled to relief. In this matter of the legal title, his complaint really concerns the priority of the title or the action of the Government, over which the Courts have no control. It has been shown that the plaintiff's patent is wholly inoperative and ineffectual, for the reason that the grantor did not own at the time any right, title, or interest in the land on which it could have effect, even if not otherwise void; and further that it is utterly void from its inception, for the reason that the confirmation was void; consequently he has no more legal title now than he had at the date of the former suit. The equities are substantially the same as before, and the same matters were then adjudicated. The former decree is, therefore, a complete bar to this suit.—(Parish vs. Ferris, 2 Black, 606; Perine vs. Dunn, 4 J. Ch., 140; 2 Story's Eq. Jur., s 1523.)

The great lapse of time and the statute of limitations

have been urged upon our consideration. On this it will be enough to say that the defence, resting upon a Spanish possession under a concession and recorded survey and continued to the present time under an absolute title from the United States, dating from the year 1806, needs no help and could derive no additional strength against the plaintiff here from any statute of limitations.

The judgment will be reversed and the petition dismissed. The other judges concur.

N. HOLMES.

BRIEF.

PROPOSITION I.

The record in this case does not show that any one of the questions stated in the 25th section of the Judiciary Act, arose in the State Court, and was decided in the that court as a question indispensable to the judgment in this case.

Both parties claim title under the acts of Congress, of 2d of March, 1805, and 3d of March, 1807, (2 Stats. at Large, 324 and 441,) by patents issued under the provisions of said acts.

The controversy in the case is as to the true boundaries of the respective tracts of land. The plaintiff claimed that the lands in his junior patent, of January, 1862, were erroneously included within the elder patent of defendants' grantors, of March, 1852.

Plaintiff's petition in equity, and the answer of defendants, do not in any way draw in question the validity of any act of Congress; and the decision of the State Court in dismissing plaintiff's petition (Rec., p. 350) upon the record as presented before this court, does not draw in question the validity of any act of Congress, and decide against its validity.—(See Record, p. 3 to 26, and p. 350.)

A large proportion of the lands in the United States

are held under the acts of Congress and patents issued in pursuance thereof, and every action of ejectment in a State Court, might draw in question the construction of some act of Congress; but this court has no power to take jurisdiction on a writ of error from a State Court, unless that court *has decided against the validity of an act of Congress, or some other question specified in the 25th section, "and have come to the very decision of that question, as indispensable to that judgment.*—(*Crowell vs. Randell*, 10 Peters, 392, on review by Mr. Justice Story of all the cases prior to that date—1836.)

So also it was held in the case of *Armstrong vs. Treasurer, &c.*, (16 Peters, 281, 285,) and the decision of this court as to jurisdiction in cases coming from a State Court is stated thus: "It must appear from the record, that the question was necessarily involved in the decision, and that the State Court could not have given the judgment or decree which they passed, without deciding it."

In the case of *The Commercial Bank vs. Buckingham's Ex'rs*, (5 How., 341,) the same rule is stated by Mr. Justice Grier, who delivered the opinion of the court. So also in *Lawler vs. Walker*, 14 How., 149; *Medbury vs. Ohio*, 24 How., 414; *Railroad Co. vs. Rock*, 4 Wallace, 177; *Ryan vs. Thomas*, 4 *id.*, 603; *Semple vs. Hagar*, 4 *id.*, 431; *Lanfear vs. Hawley*, 4 *id.*, 204; *Smith vs. Hunter*, 7 How., 738, approving case of Armstrong vs. Treasurer, &c., 16 Peters, 285.

PROPOSITION II.

The opinion of the State Court is no part of the record in this case, and the motion to dismiss must be decided according to the transcript sent up to this court from the State Court.—(*Medbury vs. Ohio*, 24 Howard, 414; *Ocean Ins. Co. vs. Polly*, 13 Peters, 165.)

The issues in the pleadings, and the evidence in the case, and the judgment rendered by the State Court, do not show that any question under the 25th section of the

Judiciary Act, was raised and decided by the State Court as indispensable to the judgment.

On the contrary, it appears clearly and conclusively that the decision of the State Court is based upon other grounds, such as a want of equity, want of notice of equities to innocent purchasers, long continued adverse possession, the bar of a former decree upon the same subject-matter between the same parties, the true location of the land in another place, and other defences upon matters of local jurisdiction in the State Court. Whatever opinion that court might have entertained upon the true construction of the said acts of Congress under which the parties claimed title, the plaintiff's petition must have been dismissed upon any one of the many valid defences made by the defendants under the local law of Missouri, as they appear of record. And upon most of these defences the proofs are uncontradicted and conclusive in favor of the defendants. The possession of Labeaume commenced in February, 1798, by a formidable enclosure and valuable buildings, and continued until May, 1816, when he sold to Wm. Chambers, for full value, by full warranty deed, without any notice of Brazeau's claim, and Chambers and Christy and Wright, his grantees, and their grantees, have had and held adverse possession to this day of all the land. The confirmation to Labeaume was on the 22d of Sept., 1810, upon a claim of the 26th of February, 1806, and the patent of 25th March, 1852, related to the 26th February, 1806, and passed title as of that date.—(Landes vs. Brant, 10 How.)

Pierre Chouteau, the adjoining proprietor on the south of Labeaume, purchased the Brazeau reservation before 1798; he saw the south ditch and stockade fence of Labeaume, established as a boundary between him and Labeaume in 1799; he called for Labeaume as his north boundary in the same year, (Rec., p. 139, 140, 142,) and procured a Spanish grant and survey so as to include the

Brazeau reservation in the larger grant to himself; and the two parties, Labeaume and Chouteau, and their grantees, have possessed these respective tracts of land ever since 1799 according to the said boundary line of the ditch and stockade fence of Labeaume. As late as the 26th of May, 1826, Pierre Chouteau, in an official protest to the Commissioner of the General Land Office, declared that the Brazeau reservation was south of Labeaume's ditch and fence.—(Rec., p. 108.) The deed under which Chouteau acquired the title to the Brazeau reservation locates it in the same place—at the foot of the Big Mound, which is four arpens south of Labeaume's ditch and fence.—(Rec., p. 39, 232, 125.) The defendants have also obtained a former final decree in this same matter.

The foregoing undisputed facts establish the following defences in favor of defendants, under the local laws of Missouri: 1st. That plaintiff was barred by the Spanish law of prescription. 2d. That he was barred by the statute of limitations. 3d. That he was barred by long acquiescence in a common boundary line between Chouteau and Labeaume, and their grantees. 4th. That defendants were bona fide purchasers of the legal title in 1816, without any notice of plaintiff's grantors' pretended equities. 5th. That the Brazeau reservation was truly located by the terms of the deed creating it and conveying it, south of Labeaume's Spanish survey and patent, and that its boundaries could not be extended within Labeaume's patent. 6th. That by the terms of the deed from Brazeau to Chouteau, no part of the land sued for could pass to Chouteau, (Rec., p. 39,) and that plaintiff had no title or pretence of title, by any conveyance, for this land. 7th. That the former decree in Magwire vs. Tyler et al., 1 Black., was conclusive in this suit, and binding upon the parties as *res adjudicata*.

It appears therefore that the State Court was bound to dismiss the plaintiff's petition without any regard what-

ever to any question within the purview of the 25th section of the Judiciary Act; and this court has no power to take jurisdictian of the writ of error under the authorities cited.

PROPOSITION III.

The decision of the State Court was necessarily in favor of the validity of the said acts of Congress under which both parties claimed title. The question under said acts of Congress was one of construction, not of validity, and this does not give jurisdiction to this court.—(Commercial Bank vs. Buckingham's Ex'rs, 5 Howard, 342–3.)

The court below might have held that the defendants' title, under said acts of Congress, was better than the plaintiff's title, and such decision would be in favor of the validity of said acts of Congress if the defendants held the better title. It has been expressly decided by this court that defendants had the better title in cases involving this same title.—(*West vs. Cochran*, 17 Howard, 408 to 414, and *Magwire vs. Tyler*, 1 Black., 198.)

PROPOSITION IV.

This court held, in *Magwire vs. Tyler*, 1 Black, 202–3, that jurisdiction might be taken of the former suit in equity, on writ of error from the State Court, because "the construction of acts of Congress, conferring power on the Secretary of the Interior to do the acts complained of, were prominently drawn in question, and the decision below rejected the title set up, by maintaining the validity of the Secretary's decision." The CHIEF JUSTICE and Mr. JUSTICE GRIER dissented from this opinion, and held this court had no jurisdiction.

It is manifest this court had no jurisdiction of that case, for, in the opinion of Mr. Justice Catron, in *West vs. Cochran*, 17 Howard, and Magwire vs. Tyler, *supra*, it was held that, under the acts of Congress, the Secretary

had power to decide upon the surveys, and that his decision was correct. Therefore the decision of the State Court, to the same effect, was *in favor of the validity* of said acts of Congress, and precluded this court from taking jurisdiction of the writ of error in *Magwire vs. Tyler*, 1 Black, 202.

PROPOSITION V.

The decisions in *Magwire vs. Tyler*, and *West vs. Cochran*, were, in law and in equity, a final determination of all questions arising under acts of Congress, and of all controversies concerning the titles of the parties in this suit, to the lands in question.—(*Lessee of Parrish vs. Ferris et als.*, 2 Black, S. C. U. S., 608; 2 Story's Eq., § 1,523, and note; Mitford's Eq. Pl., by Jeremy, 238; 2 Smith Lead. Cas., 424, and notes.) After proofs conclusive; of the possession of innocent purchasers for fifty years; after three decisions of the Supreme Court of Missouri, and two final decisions of this court in favor of defendants; after a final decision of the Interior Department of 1851, and two patents of the United States of 1852, to the respective parties, and a final decree of the St. Louis Land Court, of 1858, upon the merits, in favor of defendants, affirmed by this court in 1862, in *Magwire vs. Tyler*, the plaintiff, through some mysterious influence over the Interior Department, procured a second survey and patent to Brazeau, in June, 1862, for the land within Soulard's survey, and Labeaume's patent, and filed the same petition in equity that had been adjudicated upon in the former suit.

The State Court held that the Labeaume patent of 1852 conferred a better title than the patent to Brazeau of 1862, and this decision is in favor of the validity of said acts of Congress of 1805 and 1807, and of all other acts bearing upon the case.—(*West vs. Cochran, and Magwire vs. Tyler.*) The questions raised under the new patent, were those of construction, and not of validity, and give

this court no jurisdiction. The second patent of 1862 was clearly void.—(See cases cited, and *Cage vs. Dauks*, 13 Ann. La. R., 128; *The United States vs. Stone*, 2 Wallace, 535; *Lott vs. Prudhomme*, 3 Rob. La. R., 293; *Lytle vs. Arkansas*, 9 How., 314; *Haile vs. Gaines*, 22 How., 144, 18 How., 43, 14 How., 377.)

PROPOSITION VI.

The opinion of the State Court that the Board of Commissioners had no jurisdiction to make the confirmation to Brazeau, and that it was void, is not at all necessary to support the judgment dismissing the plaintiff's petition; and if it were the only point of defence, the opinion is correct, and in accordance with the decisions of this court and the acts of Congress of 1805 and 1807.—(4th sec. act 2d March, 1805, 2 vol. Stats. at Large, 326; 5th sec. of same act; 5th and 7th sections act 3d March, 1807, p. 441.)

Wilcox vs. Jackson, 13 Peters, 449.
Chouteau vs. Eckhart, 2 How., 374.
Strother vs. Lucas, 6 Peters, 771–2.
Strother vs. Lucas, 12 id., 453, 4 and 8.
Bissell vs. Penrose, 8 How., 333, 338.
United States vs. Percheman, 7 Peters, 85, 90.

The foregoing authorities are conclusive, that the Board had no jurisdiction to confirm any land to Brazeau under the claim filed and prosecuted by Labeaume.

This court having held that the Labeaume confirmation and patent vested the title to the land in question in Labeaume, it follows as a necessary result, that the confirmation to Brazeau, so far as it conflicts with Labeaume's patent, is void and of no effect; and such decision is upon a mere question of construction, and gives this court no jurisdiction.

In conclusion, defendants insist upon the application of the well settled doctrines of this court for more than

thirty years past, so as to bring to an end, on this motion, the plaintiff's champertous suit, which was fully adjudged in *West vs. Cochran*, in 1855, and again adjudged in *Magwire vs. Tyler*, in 1862, and never had any validity, or even a plausible pretext for success. This land, in the city of St. Louis, exceeding $500,000 in value, has been kept out of market for seventeen years, by this piratical and unfounded claim, at an expense of about $150,000 for taxes to the owners.

The writ of error should be dismissed.

BRITTON A. HILL,
Of Counsel for Defendants in Error.

WASHINGTON, D. C., *January* 5, 1868.

Supreme Court of the United States.

DECEMBER TERM, 1867.

MAGWIRE
vs.
TYLER AND OTHERS. } No. 253.

On Motion to Dismiss for Want of Jurisdiction.

On examining the statute of Missouri I find that it does not, in express terms, make the opinion of the Court a part of the record. *It shall be filed* in the cause, and remain on file—whether this do or do not make it a part of the record, so that the Court here can find therein the questions which were considered; and the points decided is not, however, material in this case. This record shows that "*there was,*" necessarily, "*drawn in question*" (in more than one instance) *an authority exercised under the United States, and that the decision is necessarily against such authority.*"

It is claimed that here is a question of location—but however, it might have been in the case of Magwire vs. Tyler, (1 Black, 195,) in the present form of *this* case no such question could arise. The plaintiff claims under a survey and patent, dated June 10, 1862, embracing the land in controversy, and describing it by metes and bounds. There is herein no question of location.

If the General Land Office, and on appeal, the Secretary of the Interior had power under the "United States" to

order the survey, and if the President had a right to issue the patent, the plaintiff has title to *the very land* in controversy, unless some pre-existing condition of things destroyed the effect of these acts. Whether it did or did not is for this Court to determine, on the evidence, under the laws of the United States. Since the approval of the survey and the issuance of the patent there can be no question of *location*. Before these took place that question might have arisen; but a majority of this Court, in the case of Magwire vs. Tyler, (1 Black, 202 and 203,) held that this question, and indeed all the questions which arose in the case were so involved with and depending upon the power of officers acting under authority of the United States, as to bring it within the jurisdiction of this Court. But since the survey and patent of 1862, describing the land by metes and bounds, the question of location in a judicial sense becomes impossible. It has most certainly become a question of *power*, and the due execution of power, by officers acting under the authority of the United States; and this question runs through, and is the whole case from beginning to end, attending it in all its phases.

The defendant has an elder patent for the same identical land, which is included in a larger tract containing it, and out of which the tract claimed by plaintiff is reserved.

It is then a question of POWER, not of *location or boundary*. I need not on this motion argue the question, whether the officers of the United States had, in very deed, *power* to make the survey and issue the patent. It is enough to give this Court jurisdiction that such question arose and was decided against the power. But the Court cannot have a full understanding of this point without looking into the condition of the case which led to the final official action, the issuance of the patent to Brazeau's representative in 1862. And indeed, the brief of defendant's counsel which covers the whole case admonishes me that I should consider it fully, lest an unfavorable impression of the merits be left on the mind of the Court.

The defendant has an elder patent, dated March 25, 1852, for the large tract embracing the land in controversy, which patent contains the following clause:

"Saving and reserving any adverse right which may exist to any part thereof." (Record, p. 72.)

Now, on the hearing of this cause, the questions necessarily arose—

Had the President power, under the law, to insert this saving in the defendant's patent? Has this clause any validity? And had the President power to convey by patent this adverse right to the person entitled? And does the plaintiff in this case show himself to be so entitled?

All these questions arise under the laws of the United States, and authority exercised under those laws.

And to answer these questions, we must trace these claims to their origin. I will touch them briefly.

The confirmation by the United States Commissioners is the first act giving title, of which our Courts can take judicial cognizance. But this confirmation is not a mere arbitrary act. It must rest on an inceptive Spanish title, to which it must conform. The concession to Brazeau is therefore necessary, to explain and sustain this confirmation. In his petition he asks for a grant, in the western part of the town, of a tract of land situate beyond the foot of the mound called La Grange de Terre, four arpens in width by about twenty in depth. His boundary is sufficiently defined by the concession. (Record, p. 34.) It is in substance—"four arpens in front by twenty deep, situate north of the town, which twenty arpens shall begin at the foot of the hill where stands the Grange de Terre, extending north northwest to the environs of Rocky branch—bounded on one side by the bank of the Mississippi river, and on the opposite side" it is indefinite, but four arpens in width sufficiently define it; "and at the two ends, bounded on the northwest by the vicinity of Rocky creek, and on the south southeast by the land granted to the free mulattress Esther. Esther's

was a prior grant, four arpens in width, bounded by the 'bluff' bank of the Mississippi, its *northern portion* situate between the Grange de Terre and the river." (Record, p. 32.) It was accompanied with a plat showing its position with respect to the mound.

It is claimed to throw the 4 × 4 arpens of Brazeau on the land below the ditch, within Esther's survey. The course of the river forbids this. Take the courses of Esther's survey, as laid down in the concession, and that of Brazeau, and they indicate a bend in the river, which is found at the point where the concessions meet. Extend Brazeau south beyond that line, and take his other well-defined boundaries, and it will throw him several arpens into the river. Bring his beginning at that point on the bank, and the course will throw him off from the river so far that making the river a boundary, and running to Rocky creek, would include more than one hundred and fifty arpens.

These are the calls by which Brazeau's 4 × 20 arpens was to be confirmed, located and surveyed by the officers of the United States—and I submit, that the location, as described in the concession, was quite sufficient to warrant the confirmation and survey. One thing is worthy of note in this description—the tract "shall extend in a northwest course from the foot of the hill where stands the Grange de Terre." The *foot of the hill* was a very rational boundary on the west side of the tract, and was in fact the western boundary, but if it were a continuous ridge it would give no starting point for the line running north northwest to the vicinity of Rocky Creek, unless the *hill* on which stands La Grange de Terre was seperated in front from the continuous ridge by an intervening depression. This is the case, as will be seen by reference to the profile map, (Rec. 258 referred to printed Rec. 139,) from which point springs the ditch which marks the southern boundary of the 4 × 20 arpen tract, and separates it from Esther's grant.

Such was the descriptive location of Brazeau's concession, which, as we claim, warranted the confirmation and survey.

Indeed I cannot conceive how a tract of land could be more accurately and certainly described without running the lines, and describing it by metes and bounds. This is undoubtedly material, for a concession must precede a *confirmation*—and the confirmation must be of the land conceded—having, as all material things which exist in space have, *locality*.

Before the confirmation of this tract Brazeau conveyed it to Lebaume, reserving 4 × 4 arpens "at the foot of the hillock on the southern part of the land."

On the 22d of September, 1810, the Board appointed under the authority of the United States for the adjudication of land titles confirm the larger tract to Labaume, and the four arpens to Brazeau, "agreeably to a reserve made in a sale from Joseph Brazeau to Louis Labaume," for which confirmation a patent certificate was issued by the Commissioners with an order of survey. (Record, pp. 38, 39.) The Supreme Court of Missouri deny the power of the Commissioners to make this confirmation, and therefore hold it void. We, in behalf of the plaintiff, contend that their act was valid. The location of Brazeau's 4 × 20 arpens was quite definite enough to warrant a *confirmation* and *survey*; and when once the boundary of the tract was fixed, the 4 × 4 arpens reservation became absolutly certain—the reservation is *in* the tract, not *out* of it—and it is in the southern part of the tract next the hillock. However loose the description may be in some of these papers, it is in every case rendered certain by reference to the description of the tract as conceded, and out of which the reservation was made. The confirmation passed to the parties an equitable interest—by which I understand a right to a survey and patent pursuant to the concession and confirmation—but it required a survey under the authority of the United States. The record shows that such survey was duly made for Labaume, and at his request in November, 1817, (Record, pp. 40, 41,) in speaking of which this Court say in the case above cited. (1 Black, p. 202.)

"The survey made by Brown in 1817 for Labaume included both the tracts confirmed to Labaume and Brazeau. This survey was duly approved, and so continued for fifteen years. A patent might have issued on it either singly to Labaume or jointly to the two owners—Brazeau's sixteen arpents being granted to him in the southeast corner of the survey."

The Court adds:

"Standing on the original concession, Brazeau's tract had no specific boundary and attached to no land, but Brown's survey identified its boundary and locality, and vested a title to the land, subject to be sued for and recovered under the local laws."

The location of the tract of Brazeau being fixed by a survey duly authorized, made and approved, could not be destroyed by the act of Labaume and his counsel in an *ex parte* proceeding before the Secretary—his rights were fixed until some act of his own, or some official act in the nature of a judgment, to which he was a party, modified or destroyed them. The survey which fixed the right of Brazeau in 1817, could not be destroyed *by implication* by the mere order and fact of a re-survey in 1852 in behalf of Labaume and on his motion. The location remains in fact and in law. This the Supreme Court of Missouri denies. But such being the fact and the law, there could be thereafter no question of locality or boundary, but merely a question of title—how derived this Court in the passage cited clearly show. But if lost, how lost? It was lost, if lost, simply by the refusal of the Department to issue a patent on a survey duly made and "*duly approved.*" This survey was never *set aside* by the Secretary—he merely ignored it—decided the question of title judicially, and ordered a patent to issue to Labaume for the whole tract; and that a survey be made for Brazeau and a patent issued to him for land as completely out of and beyond his concession and the survey of Brown, which gave that concession locality, as if it had been ordered on the other side of the Missisippi.

The order was made in the absence of Brazeau's representative on the motion of his opponent's counsel. He refused to accept it, and it was recalled, and he was remitted to his rights as they were prior to this unauthorized act. (1 Black, p. 199.)

One who is in the habit of witnessing and participating in the trial of causes before courts of justice can hardly read the *ex parte* proceeding in this case, and the opinion of the Secretary therein, without feelings of indignation; but his utter ignorance of the titles he adjudged is his justification. But Brazeau had an equity which an ignorant executive officer could not, by a stroke of his pen, destroy. The patent which issued to Brazeau in 1852, on the motion of his opponent's counsel, was as completely void as if it had covered land in Illinois. It is now out of the way and Brazeau is restored to his former rights. What are those rights?

Brown's survey of 1817 for Labaume, which defined by metes and bounds Brazeau's confirmation, was *not set aside*, but a survey was ordered for Labaume's tract, to commence above the ditch, according to Soulard's survey, and a survey south of the ditch for Brazeau's tract, to extend to the foot of the mound, covering in its entirety land of which he never owned and never professed to own one foot.

We contend that Brown's survey of 1817, once valid and once giving Brazeau's confirmation, locality, and legal validity still subsists; that Labaume's application for a resurvey and the granting of it so as to swallow up Brazeau's land might be binding on Labaume, but was not on Brazeau. The order and the making of a new survey might, by implication, set aside the survey of 1817 as to Labaume, or any subsequent survey which he obtained; but this act of his could not even by implication affect the vested rights of Brazeau. The survey of 1817 therefore remained, not having been set aside by the Secretary until the survey of 1862 on the same ground re-affirmed it, and in addition thereto fixed the dividing line with Labaume.

But if the survey of 1817 was destroyed by Labaume's survey of 1852, it cannot effect Brazeau's location, for if Secretary Stuart could, in 1852, set aside the survey of Brazeau's tract made in 1817, *he could not cause it never to have existed*. It is still a fact, this Court says, (1 Black, p. 202,) rights were acquired under it for Brazeau. The act of the Secretary cannot make those rights *never to have been acquired*. The survey still remains *a fact;* it was made by the request of Labaume and acquiesced in by him. The title it gave to Brazeau remains, and must remain until set aside by a court or relinquished by the party, and if Stuart, as Secretary of the Interior, could, in 1852, by ignoring the survey of 1817, destroy it, Smith, as Secretary, could, in 1862, by ignoring the survey imposed on Brazeau in 1852, annul that also, so that Brazeau's confirmation of 4×4 arpens would stand at that time without a survey. But, in 1862, a survey was duly made and approved, and a patent issued to Brazeau for his land described by metes and bounds. The question is, not where does his land lie, for in the language of the Supreme Court of Missouri—

"The executive officers have settled this matter of location, and it is no longer open to judicial inquiry."

And how have they settled it? by confirmation surveys and patents; but the acts of the United States officers, under which these parties claim, are in conflict, and we ask and are entitled to the judgment of this Court as to the right each party claims to hold under such confirmation, survey, and patent, made and issued by such officer, and ~~in every such case~~, in every step of the process by which title is commenced or claimed in behalf of plaintiff. "There is drawn in question an authority exercised under the United States," and in the decision of the State Court against such title, "the decision is against the validity" of the authority so exercised. Such was the opinion of this Court in the case of *Maguire vs. Tyler*. The Court say, page 203:

"The case falls within the principle declared in Lytle's case, (22 Howard, 202.) The finding of the State Court and the decree founded on that finding, show that the question necessary to give this Court jurisdiction was raised and decided."

It is more especially so in this case, which rests upon the power of the officers of the United States to make the survey and issue the patent of 1862, and the validity of such survey and patent. The Court of Missouri in deciding the case *necessarily* decided against the validity of those acts, and in their opinion filed as a part of the record in the cause they say they so decided. If those acts were valid, both claims are fixed by metes and bounds, so there can be no longer a question of location or boundary.

As to the question on which the case *may have been decided*, which is conjectured to oust this Court of its jurisdiction, it must be a question in verity, not in fiction or pretence merely. It must be a question so raised in the case that a Court might *properly* deliberate and decide upon it. For example, take the question of location. Everything *physical* ~~which exists~~ exists in space, and therefore has *locality;* and it may be a question, *where?* I sell a tract of land—section 10, township 12, range 14, in Dover township, Athens county, Ohio, reserving ten acres in the southeast corner of the tract. Here is a question of location. Where is Ohio? Where in Ohio is Athens county? Where in Athens county is Dover township? And where in Dover township is section 20, town. 10, range 14? And, to make the case strictly analogous, it might be a question where the ten acres, reserved in the southeast corner of the section, lay—whether *in* the section, or somewhere else *out* of it? These, however, are not questions which could call for the judgment of a Court, and which this Court would consider as questions raised and decided in the Court below. There never has been, and there never can be, a question as to location in the case at bar, about which a Judge, or lawyer, or United States surveyor, or other person, acquainted with land titles could for a moment

doubt. The only question is, and has long been, whether the case is so netted and entangled, by official action of the officers of the United States, that its laws have become ineffectual, and its Courts cannot decree justice.

There can be no question as to the form of action. The Missouri code requires the same proceedings in law and equity, and of necessity, on writ of error here, that code gives the law of proceeding.

T. EWING,
For Plaintiff.

108 107 Judge Davis

Supreme Court of the United States.

JOHN MAGWIRE, PLAINTIFF IN ERROR,

vs.

MARY L. TYLER AND OTHERS, DEFENDANTS IN ERROR.

ERROR TO THE SUPREME STATE COURT OF MISSOURI, UNDER THE TWENTY-FIFTH SECTION OF THE JUDICIARY ACT OF 1789.

BRIEF AND ARGUMENT OF BRITTON A. HILL, ESQ.,

FOR DEFENDANTS IN ERROR, ON MOTION TO REFORM JUDGMENT OF THE SUPREME COURT OF THE UNITED STATES.

STATEMENT OF CASE ON MOTION.

The defendants in error have filed a motion in this case to reform the order for judgment. This order is found at the close of the opinion of the Court by Mr. Justice Clifford, and is in these words: that "the judgment be reversed and the cause remanded, with directions to the Supreme Court of Missouri to affirm the decree of the St. Louis Court of Common Pleas."

Defendants state, that this order is directly in violation of the powers and jurisdiction of this Court, conferred upon it by the constitution of the United States and regulated by the judiciary act, in this, that said order excludes, overrules and determines, decisions of questions of local law, of estoppel, of limitations of bona fide purchasers, of *res adjudicata*, of equity, of derivation of title, of the location of lands covered by deeds and other defences, over which the State Courts, under the federal constitution, have exclusive, original and appellate jurisdiction, and this Court has none.

On the face of the record in this case, these questions of State local law exist and are fully set forth, with ample and in some of the defences *conclusive record evidence*, to establish eight or more complete defences to plaintiff's suit, under local law, and they are wholly independent and exclusive of all and every question or questions over which this Court has any jurisdiction on writs of error from Supreme State Courts.

It is admitted in the opinion of the Court in this case, that the defences under State law in this suit are not re-examinable in this Court, and that jurisdiction is held only on questions arising under federal laws. It is directly alleged in the said opinion, that the authority of Magwire *vs.* Tyler, 1 Black, 198, is not conclusive on the merits of this suit, because jurisdiction of the writ of error in that case was acquired under the decision of the State Court, that Brown's Survey of 1817, of two tracts in one, had been legally set aside, "and in that state of the case, *this Court could not decree anything under* the 25th section of the judiciary act, *except the question as to the power of the secretary* of the interior, *to set aside that survey.*" And this Court held in that case, that the State Court decided correctly in favor of the validity of the acts of Congress, conferring the powers exercised by the secretary over such a survey. The survey of 1817 never had any legal existence; it was never recorded, and was rejected by the recorder of land titles and not by the secretary of the interior. (Rec. 142, 3, 4, 223 to 230.) The secretary never mentioned the survey of 1817 in his decision, for it had no existence or recognition in the General Land Office, it never having been recorded. *Gamache* vs. *Piquinot.* 16 How. (Rec. 223 to 230.)

The plaintiff's petition in equity in this suit prays that the elder title of Labeaume, vested in him by patent of the 25th March, 1852, for the land sued for, may be divested out of defendants' representatives of Labeaume, and vested in plaintiff as representative of Brazeau. Two patents had been issued to Brazeau on the same confirmation, made September 22, 1810; the first one, of 25th March, 1852, for land south of Labeaume's ditch, at the foot of the big mound; the second one, of 10th June, 1862, for the land sued for, lying in the southeast corner of Labeaume's patent not "at the foot of the big mound."

The legal title of defendants being admitted in the pleadings, and expressly relied on by plaintiff to give an equity to divest it, this Court holds that the legal title was not in Labeaume but in Brazeau, by force of the junior patent of 1862 to him. This ruling is directly in conflict with plaintiff's petition, and leaves no equity to be enforced.

Plaintiff's petition sets forth five leading facts to establish his equity, so as to authorize him to invoke the aid of a Court of Chancery.

First. That Soulard's Spanish survey for Labeaume included within it Brazeau's reservation claimed by plaintiff, which was alleged to be part of an elder grant to Brazeau of 1794.

Second. That the confirmation of 1810 to Labeaume included the reservation within Soulard's survey for Labeaume, at the southeast corner thereof, it being Brazeau's land.

Third. That Brazeau's reservation is properly to be located on the ground within Labeaume's patent, by the testimony of witnesses as to the situation of boundaries and monuments, and from the location of surrounding tracts of land and surveys.

Fourth. That defendants and their grantors were not innocent purchasers of the land in Soulard's survey for Labeaume, but had notice of Brazeau's reservation being within Soulard's survey for Labeaume of 1799, and confederated with the United States officers to procure the patent to Labeaume, so as to include the reservation.

Fifth. That on the 10th June, 1862, the United States made a patent to Brazeau for sixteen arpents of land within Labeaume's elder patent, and that Labeaume's patent is a cloud upon the title, which a Court of Equity ought to remove.

THE ANSWER OF DEFENDANTS denied all the equities claimed, all the allegations concerning the supposed fraud or mistake in the location of the reservation within the Soulard survey of 1799 and United States patent for Labeaume of 1852, and set up the following INDEPENDENT DEFENCES, *having no reference to the construction of any act of Congress.* or the acts of any officer of the United States, or the vesting of any title thereunder.

First. That the boundaries of the Brazeau reservation required it to be located outside of Labeaume's patent, between the big mound and Labeaume's southern ditch, bounded east by the Mississippi River.

Second. That the plaintiff shows no equity in his bill, by virtue of the new patent to Brazeau of 1862; and as the United States had no title or equity to vest in any one, the new patent grants nothing.

Third. That plaintiff is barred from recovering the land sued for by estoppel, by boundary line established between Labeaume and Chouteau, grantee of Brazeau, in 1799, at Labeaume's south ditch and stockade, and recognized, and acquiesced in for twenty-four years by both parties, then owning and claiming the land on each side of said boundary.

Fourth. That defendants and their grantees have held continuous and notorious adverse possession of the land sued for, by enclosures and improvements, from 1798 to 1862, claiming to own the same.

Fifth. That defendants and their grantors were innocent and bona fide purchasers for full value, in April 1816, of all the land in Soulard's survey, then in Labeaume's possession, by full warranty deeds, with full covenants of title, before any United States survey was made of the confirmation to Labeaume, and without any notice of the pretended equities set up by the plaintiff in this suit, forty-six years afterward.

Sixth. That plaintiff has no derivative title to any part ot the land sued for, from Brazeau; that the deed from Brazeau to Chouteau of 1816 is the only conveyance from Brazeau to plaintiff's grantor, and does not cover any part of the land sued for, but grants other land south of Labeaume's patent.

Seventh. That the reservation of Brazeau in his deed to Labeaume of 1798, even if held to be an exception, is inoperative to reserve any land other than the land described in said deed as lying at the foot of the big mound, and necessarily south of Labeaume's south ditch; and does not create any reservation within Soulard's survey for Labeaume, or within Labeaume's patent, which is for the same identical land as that contained in Soulard's survey. A fair construction of that deed fixes the reservation at the foot of the mound.

Eighth. That plaintiff was barred from asserting any equities in this case, by reason of the lapse of more than half a century after the alleged equity arose, under the supposed erroneous survey of Soulard in 1799, and the confirmation of 1810, and that the patent of 1862 to Brazeau, being a mere quitclaim of the United States, gives no new equity, but simply a relinquishment of all the interest of the United States, amounting to nothing; for by the plaintiff's bill it is admitted the title was vested in Labeaume in 1852, by prior patent for the same land.

Ninth. That a patent was issued to Brazeau in 1852, for the reservation lying between the big mound and Labeaume's south ditch, and the grantees of Brazeau accepted said patent, and hold title under it; that plaintiff has no deed for any land within the patent of 1852, and was not a legal representative of Brazeau for any part of the land known and described as the Brazeau reservation, and had no right to protest against the patent of 1852, or demand its recall.

Tenth. That it is against equity and good conscience for Brazeau's grantees to hold the land between the big mound and Labeaume's south ditch, under the patent to Brazeau of 1852, and at the same time claim the same reservation under the new patent of 1862 in another place; and it is against all equity for the grantees of Brazeau's reservation to demand the land granted by the new patent, and divest the titles of their grantees, Ann Biddle and others, under the old patent of 1852.

Eleventh. That all the equities set up in the bill of plaintiff have been adjudicated in favor of defendants, in a former suit in equity, between the same parties and privies, in regard to the same identical subject-matter, in a suit commenced the 22d August, 1855, by a bill stating the same identical facts, excepting only the new patent of 1862

on which the St. Louis Land Court, 22d June, 1858, entered a finding of all the material facts of location, possession, and other matters in the form of a special verdict, and entered a decree thereon, dismissing the plaintiff's bill, which decree was affirmed by the Supreme Court of Missouri, on the merits; and on writ of error to this Court, the same decree was affirmed on the merits by this Court, and the Brazeau reservation declared to be situate *at the foot of the big mound, south of Labeaume's ditch*; and that said decree is final and conclusive forever as to all matters of fact therein found and adjudicated, and as to all matters of law and equity therein determined or litigated.

Twelfth. That the United States, in 1862, had no interest, claim, title or equity in or to, the land sued for, lying within Labeaume's patent of 1852, that patent having been issued in conformity with the act of Congress of March 3d, 1807, by order of the Commissioner of the General Land Office, and upon a survey and patent certificate giving specific metes, bounds, courses and distances, to the entire ambit of the tract of land granted by the patent.

The record in this case shows conclusively, without any opposing facts, that the 3d, 4th, 5th, 6th, 7th, 8th, 9th and 11th defences set up in the answer as above stated were fully sustained by the evidence and testimony on the hearing of this cause; and neither one or all of said defences have any reference to federal laws or statutes, but are strictly confined to the local law of the State of Missouri.

The answer further stated that the confirmation of 1810 to Brazeau was void, because it was made in direct violation of the act of Congress of 2d March, 1805, and 3d March, 1807, prohibiting any confirmation to Brazeau, who had not filed any notice, and who did not own, or inhabit and cultivate, the land or any part thereof on the 1st of October, 1800, or 20th December, 1803, as required by the said acts.

This Court has taken jurisdiction of the writ of error sued out by the plaintiff in error to the Supreme Court of Missouri on this single point of construction of the said acts of Congress; and having thus acquired jurisdiction, which only authorized this Court to examine and decide that question under those acts, the order in the last three lines of the opinion directing the Supreme Court of Missouri to affirm the decree of the Court of Common Pleas, in effect passes upon all the said valid defences under the laws local to the State of Missouri, over which this Court has no jurisdiction, and the decision in the State Court is final and conclusive, as the decree of a Court of last resort, having exclusive, original and appellate jurisdiction in the premises.

The decree of the St. Louis Court of Common Pleas of 1865 was a

general decree on the whole bill, without any finding of specific facts, or the statement of any conclusions of law. It merely finds that out of the claim presented to the Board of Commissioners by Labeaume, the 4 by 4 arpents claimed by plaintiff was confirmed to Joseph Brazeau or his legal representatives; and the Court finds the issues in the cause for the plaintiff, and decrees the land to plaintiff, and divests the title out of defendants, and vests the same title in plaintiff, and orders an account of rents and profits, and appoints a commissioner to take an account thereof. (Rec. 29, 30.)

The commissioner brought in his report, and defendants excepted thereto, when plaintiff remitted a portion of the rents and profits, and Court overruled the exceptions, made the decree final (Rec. 324, 5), and gave judgment for rents and profits with costs (Rec. 325 to 332).

From this decree defendants took an appeal to the Supreme Court of Missouri, with a supersedeas; and this being a chancery case, the whole matter was open to review and revision on questions of law and fact, with full power in the Supreme Court to enter a decree of its own upon the pleadings and the evidence in the record, as upon a hearing in chancery *de novo*, under the laws of Missouri. *King* vs. *Moon*, 42 Mo. 551. *State et rel. Allen* vs. *St. Louis Cir. Ct.*, 41 *Mo.* 576, 7.

The Supreme Court of Missouri, on a full hearing in 1867, "doth consider and adjudge that the judgment of the St. Louis Court of Common Pleas be reversed, annulled, etc., and that this cause be dismissed," etc. (Rec. 348 to 350.)

The St. Louis Court of Common Pleas was abolished in 1866, under the new constitution; and it appears that said Court had no jurisdiction of this case under the constitution and code of 1855, so that the decree was void *ab initio*.

If the Supreme Court of Missouri had affirmed the decree of the Common Pleas, it would have been necessary for that Court to enter a decree of its own, and award execution; unless it had discovered the want of jurisdiction and pronounced the decree void for that reason.

On the motion filed by defendants to reform the order directing the Supreme Court of Missouri to affirm the decree of the Common Pleas, an argument was made before this Court in April last, when an order was entered to argue the case orally in October next, at the adjourned term.

BRIEF ON MOTION.

First. This Court having assumed jurisdiction of this case on writ of error, under 25th section of the judiciary act, on the ground that the

Supreme State Court of Missouri held the confirmation of the commissioners to Brazeau of 1810 to be void, that question or some other one, immediately respecting the validity or construction of an act of Congress of the United States, under which the said confirmation was made, and on which plaintiff's title immediately and exclusively depends, are the only questions of which this Court can take jurisdiction and render a decision, that will be binding on the Supreme Court of Missouri.

The decisions of this Court for more than half a century establish this proposition finally and conclusively.

Conkling's Treatise, 4th ed. 1 to 4; p. 12 to 19; p. 23 to 47.
Curtis' Comm. p. 274 to 391, and cases cited.

See also *Mathews* vs. *Zane*, 7 Wheaton, 164; 5 Curtis, 244. See also *Armstrong* vs. *Treasurer of Athens County*, 16 Peters, p. 281; *Crowell* vs. *Randell*, 10 Peters, 368; *Williams* vs. *Norris*, 12 Wheaton; 2 Wheaton, 363; *Harris* vs. *Dennie*, 3 Peters, 292; *Satterlee* vs. *Matthewson*, 2 Peters, 380; *Hickie* vs. *Starke*, 1 Peters, 94; *Craig* vs. *Missouri*, 4 Peters, 410; *Mills* vs. *Brown*, 16 Peters, 525; *Lawler* vs. *Walker*, 14 Howard, 149; *Neilson* vs. *Lagow*, 12 Howard, 98; *Smith* vs. *Hunter*, 7 Howard, 738; *Williams* vs. *Oliver*, 12 How., 111, 125; *Erwin* vs. *Lowry*, 7 How. 172; *Bank of Ohio* vs. *Knoop*, 16 How. 369; *Ross* vs. *Barland*, 1 Peters, 655, 664; *Ocean Ins. Co.* vs. *Polleys*, 13 Peters, 157; *Almonester* vs. *Kenton*, 9 How. 1; *Doe* vs. *The City of Mobile*, 9 How. 451; *Henderson* vs. *Tennessee*, 10 How. 311; *Wiscart* vs. *Dauchy*, 3 Dallas, 321; *Darousseau* vs. *The United States*, 6 Cranch. 307. See also, The Victory, 6 Wall. 382; Hamilton Co. *vs.* Mass. *id.* 632; *Rector* vs. *Ashley*, id. 142; *Walker* vs. *Villarago*, id. 124; *Barney* vs. *Baltimore City*, id. 280; *Grison* vs. *McDowell*, 6 Wall, 363; *Railroad Co.* vs. *Rock*, 4 Wall, 177; *Ryan* vs. *Thomas*, id. 603; *Lanfear* vs. *Hunley*, 4 Wall, 209. See also *McDonough* vs. *Millardon*, 3 How. 707; *Doe* vs. *Eslava*, 9 How. 440; *Semple* vs. *Hagar*, 4 Wall, 431; *Witherspoon* vs. *Duncan*, id. 210; *State of Minnesota* vs. *Batcheldor*, 1 Wall, 109; Bridge proprietors *vs.* Hoboken Co., id. 116; *Silliman* vs. *Hudson River Bridge Co.*, 1 Black, 582.

See also *Farmers' heirs* vs. *Mobile*, 9 How. 451; *Berthold* vs. *McDonald*, 22 How. 334; *Calcote* vs. *Stanton*, 18 How. 243; *Mackey* vs. *Dillon*, 4 How. 420; *Moreland* vs. *Page*, 20 How. 522; *Martin* vs. *Hunters' lessees*, 1 Wheat. 348, 9; *Smith* vs. *State of Md.* 6 Cranch, 286; *Kennedy's Exrs.* vs. *Hunts' lessee*, 7 How. 586; *Keene* vs. *Clark*, 10 Pet. 291; *Coon* vs. *Gallagher*, 15 Pet. 18; *Grand Gulf R. R. Co.* vs. *Marshall*, 12 How. 165; *Adams* vs. *Preston*, 22 How. 488; *Medbury* vs. *The State*

of Ohio, 24 How. 413; *Miller* vs. *Nichols*, 4 Wheat. 315; *Wilson* vs. *The Black Bird*, Creek Marsh Co., 2 Peters, 249; *Owings* vs. *Norwood's lessee*, 5 Cranch, 344; *The Pres. etc., of Coml. Bk. of Cin.* vs. *Buckingham's Exrs.* 5 How. 317; *McKinney* vs. *Carroll*, 12 Pet. 66, Curtis Comm. § 224; *Marbury* vs. *Madison*, 1 Cranch, 137, and *Maxwell* vs. *Newbold*, 18 How. 511, citing Crowell *vs.* Randall, 10 Pet. 368, as establishing the rule since adhered to.

The extent of power conferred by the Constitution on this Court over land cases is, "to all cases in law and equity, arising under . . . the laws of the United States," etc. Art. 3, § 2.

The act of Congress of 1789, § 25, authorizes this Court "to reverse or affirm a final judgment or decree in any suit, in the highest Court of law or equity of any State, where there is drawn in question a statute of the United States, and the decision of the State Court is against the title specially set up by either party under such statute; but *no other error* shall be *assigned or regarded as a ground of reversal* than such as appears on the face of the record, and *immediately respects the beforementioned questions of validity, or construction of said statutes, etc.* Conk., Treat., 4 ed. p. 23, 24; act of 1789, 1 vol., Stat. at Large, 70 to 80, § 25; Curtis' Digest, 273 to 282, and cases cited above.

Under the act of Congress of 1789, the only question to be decided in this case by this Court is, whether the confirmation to Brazeau was void or valid. If valid, then it vested the title in him on 22d September, 1810, for the four arpents of land within Soulard's survey for Labeaume. See *infra*. Stat. limitations.

Second. The foregoing authorities cited are conclusive that this Court has no jurisdiction of any case under the 25th section of the act of 1789, where the record shows that the State Court could have disposed of the case, on questions of State law, without deciding any question arising under the federal laws.

It must be clear from the facts stated in the record, by just and necessary inference, that the question under the federal laws was made, and that the State Court, in order to have arrived at the judgment pronounced by it, must have come inevitably to the decision and to have decided against the validity of a federal law or treaty, etc., *as indispensable to that judgment.* Curtis' Comm., § 224 *et seq.* See also cases above cited.

The burden of proof is on the plaintiff in error to establish that the State Court could not have decided the case in favor of the defendants in error, on questions of local State law; and if he fail to do this, from the facts stated in the record, this Court has no jurisdiction. See cases

above cited and particularly. 1 Pet. 23; 13 Pet. 447; 6 Pet. 727; 12 Pet. 435; 13 Pet. 157; 4 Wheat. 315; 3 Pet. 302; 10 Pet. 368; 12 Wheat. 117; 2 Pet. 249; 5 Cranch, 344; 5 How. 317; 12 How. 165; 16 Pet. 285; 15 Pet. 18; 12 Pet. 66.

In this case, the decree of the Common Pleas was a general one; no specific facts were found. The appeal from that inferior tribunal to the Supreme Court of Missouri operated as a *supersedeas*, and the Supreme Court heard the case *de novo* in equity, on all the proofs in the record according to the practice in that State, and reversed the decree of the Common Pleas, and entered a general decree, dismissing plaintiff's bill. No reasons are stated in the decree for the judgment of reversal, and the whole record can be appealed to by the defendants, to show their many legal and equitable defences under the laws of the State of Missouri; but the plaintiff is bound from the same record to prove, that the said general decree could not have been rendered by the State Supreme Court unless that Court had decided against the validity of the confirmation to Brazeau of 1810. See cases last above cited, 41 Mo. 586.

It is impossible for the plaintiff to prove that the decision of the State Court was made in this case on any point of federal law, from the record. The opinion of the Court can never be referred to by this Court as any part of the record of this case. The pleadings and evidence show eleven complete defences under State law, and one defence on the invalidity of the confirmation of 1810 to Brazeau; which it is claimed was decided to be void, against the validity of the confirming acts of Congress of 1805 and 1807, and to give this Court jurisdiction.

To test the question of jurisdiction in this case, it must appear that the decision of that question on Brazeau's confirmation, if it were against his title thereunder, was indispensable to the judgment of the State Supreme Court. If the confirmation to Brazeau of 1810 was valid, plaintiff was barred by limitations, by Labeaume's patent, by conflict of boundaries, by laches, by estoppel under boundaries and long possession, by former recovery, by want of notice of his equity to *bona fide* purchases for value, by want of a deed from Brazeau for the land sued for, and by want of judicial or other equity. If the confirmation to Brazeau were not valid, the same defences would still bar the plaintiff's suit, although the decision as to the invalidity of the confirmation would also bar the suit. The question as to the confirmation is therefore wholly immaterial, and it could not have affected the judgment or decision of the State Court, and this Court has no jurisdiction. See cases cited *supra*.

Third. Both parties claimed under the same confirmation; and the original question was, as to the true boundaries of the lands confirmed

to each party. This is a question of fact, to be determined by the State Court having original jurisdiction. In every case, except this unfortunate one of Madame Tyler's, this Court has uniformly held, that it had no jurisdiction over questions of boundary, between parties claiming under entries, preëmptions, confirmations or patents. *McDonough* vs. *Millandon*, 3 How. 693; *Mackey* vs. *Dillon*, 4 How. 420; *Almonester* vs. *Kenton*, 9 How. 1; *Farmer's heirs* vs. *Mobile*, *id.* 451; *Doe* vs. *Eslava*, *id.* 421; *Moreland* vs. *Page*, 20 How. 522; *Kennedy* vs. *Hunt*, 7 How. 593; *Lanfear* vs. *Hunley*, 4 Wallace, 204.

No distinction can be drawn between the cases last cited and this one. Location and boundaries are always questions of fact, depending on monuments, boundaries, courses and distances and many other facts. The whole stress of the opinion in this case is laid on the location of Brazeau within Soulard's survey for Labeaume, and within the confirmation of the United States to Labeaume on Soulard's survey. On these questions of fact, this Court has no jurisdiction, and the decision is *coram non judice*, so far as it affects the question of location.

Where a conflict arose between a French grant of 1759 and a Spanish grant of 1788, both confirmed by act of Congress of 8 May, 1822 (3 Stat. at Large, 699), for the same land, the decision of the State Court that the junior grant with possession must prevail was held by this Court to be final in *Doe* vs. *Eslava*, 9 How. 421; 3 How. 693; 9 How. 1, 9; 9 Pet. 224, 236; *Ross* vs. *Barland*, 1 Peters, 664; *Minnesota* vs. *Batchelder*, 1 Wall. 109; *Berthold* vs. *McDonald*, 22 How. 334; *Calcote* vs. *Stanton*, 18 How. 243; 3 Wheat. 246; *Ewing* vs. *Lowry*, 7 How. 172. It is a singular fact that this Court has twice held in favor of defendants' theory of location in *West* vs. *Cochran*, 17 How. 413, 15, *Magwire* vs. *Tyler*, 1 Black, 198, 9. See *Res adjudicata infra.*

Fourth. This Court has no jurisdiction in this case, to adjudicate or decide upon any question raised in the answer and supported by the evidence on points of law or equity, local to the State of Missouri, and wholly independent of the title set up by plaintiff under acts of Congress. Such defences under local laws are not re-examinable in this Court, where the jurisdiction thereof could not be assumed, and where any judgment or decision thereon would be *coram non judice.* See cases above cited, and particularly the following parallel cases. *Matthews* vs. *Zane*, 7 Wheat. 164; *Erwin* vs. *Lowry*, 7 How. 172; *Lytle* vs. *Arkansas*, 22 How. 203, 4; wherein it was considered how far this Court can re-examine the decisions of a State Court, on writ of error, under the twenty-fifth section of the judiciary act of 1789. In *Lytle* vs. *Arkansas*, 22 How. 203, 4, this Court says: "In their answers the defendants rely

on the statute of limitations. As this defence has no connection with the title of Cloyes under the entry, this Court cannot revise the decree below in this respect, under the twenty-fifth section. Other defendants relied on the fact that they were *bona fide* purchasers of the lots sued for, and the State Court so found, and with this portion of the decree we have no power to interfere." See also *Ross* vs. *Barland*, 1 Pet. 655.

In the opinion of the Court, this same doctrine is declared and applied to this case. At page 28 of the opinion, this Court says, defendants contend "that the answer presented other defences not re-examinable in this Court; and they insist that the Supreme Court of the State, for aught that appears to the contrary, may have decided the case against the plaintiff, and reversed the decree of the common pleas upon some of the defences set up in the answer, which are not re-examinable in this Court." This Court proceeds to say that federal questions are involved in the pleadings; "and if it appears that none of the other defences afford any legal answer to the suit," then the case is properly before this Court, etc.

At pages 33–4 of the opinion, the Court says, the former suit of *Magwire* vs. *Tyler*, 1 Black. 198, 9, was not decided on the merits in this Court, because it was founded on a survey by the United States of 1817, on which plaintiff claimed to maintain his suit, because it was illegally set aside; and if his view had been correct, this Court would have had jurisdiction on the merits. "But the respondents insisted that the survey had been legally set aside, and the Court so held; and in that state of the case, *this Court could not decide anything* under the 25th Section of the judiciary act, *except the question as to the powers of the Secretary of the Interior to set aside that survey.*"

If this Court could not decide or consider questions of State law in 1861, and was strictly confined then to a question of federal law, how is the present jurisdiction in the same case asserted over questions of State local law, which this Court holds now, to have been the law and practice then, and to be beyond its jurisdiction?

I understand the opinion of the Court to admit all the propositions of defendants stated in the above points, 1st, 2d and 3d, to wit: that the jurisdiction of this Court is strictly confined to questions arising under acts of Congress; that it has no jurisdiction or power to decide, or adjudicate on the validity of defences under State local laws: and yet in the same opinion it is said, that the defendants have no defence under the statute of limitations; or the former judgment and decree; or the bona fide purchase of William Chambers, of 1816, without notice of Brazeau's claim or equity.

If it be law, as settled by all the cases on jurisdiction in this Court since 1794, that the defences and decisions of State Courts under the local laws of the State are not re-examinable in this Court for want of jurisdiction under the constitution and acts of Congress, by what rule or authority does this Court in Mrs. Tyler's case examine the defences of limitations, bona fide purchasers, and *res adjudicata*, over which defences it is admitted this Court has no jurisdiction? 2 Black. 574, 589.

Seventh. The effect of the present decision is to reverse the rule long established in this Court, and throw the onus on the defendants, to show that they had valid defences under the local law of Missouri; and with the single object of meeting this new rule of decision, I present a number of valid defences in this case under State law, with the evidence in the record, and the authorities to support each defence.

It being proved by all the authorities, and admitted by the Court, that any one valid defence under the State law of Missouri will prevent the entry of the present order for judgment, and oust this Court of its jurisdiction, I call the attention of the Court to the following defences at law and in equity, under the local law of Missouri. All the rules and principles of equity set up are the same rules and principles universally acknowledged in Great Britain, and in the several States of the Union. Each one of the following defences appears to me to be conclusive of this case in favor of the defendants, but I am not able to discover how the burden of proving this is thrown on the defendants, nor how this Court can in any way examine into the validity of such defences.

RES ADJUDICATA, AND CONCLUSIVENESS OF THE EVIDENCE UPON WHICH THE DECREE OF 1858 IN THE ST. LOUIS LAND COURT WAS BASED.

(1.) The former decree of 1858 (Rec. 268 to 272) was upon a bill of which this present one is a copy, with the single exception of the patent of 1862, with the same identical alleged equities and prayers for relief. The judgment in the former suit covers all the facts in this case save the new patent aforesaid; the cause and object of both the actions in the State Court, and the petitions therein, are one and the same with the said exception, and hence the prior judgment being full and specific as to all the equities now set up bars the present suit as to all matters heretofore determined, and is conclusive record evidence of all the facts adjudged, to wit: among other facts, that the survey of Soulard does not embrace any portion of the land reserved by Brazeau

in his deed to Labeaume of May 9th, 1798; that the board of commissioners for the adjustment of land titles in 1810 confirmed to said Brazeau the 4 × 4 arpents which he had reserved to himself in his said deed to Labeaume, "to be taken at the foot of the hillock or mound in the southern part of said land;" that the said tract of 4 × 4 arpents of land, which was confirmed to said Brazeau, is situate in the northern part of the city of St. Louis, on the south side of an old ditch called and known as Labeaume's south ditch; that when Chouteau, on the 15th of October, 1799, petitioned for a tract of land between Roy and Labeaume of six arpents in width, Labeaume's ditches were made. That Chouteau in his petition called for the line of the land of Louis Labeaume for his northern boundary; that at the survey of 1803, the south ditch of Labeaume was recognized by Chouteau and all the adjoining proprietors as Labeaume's south line, and that possession was held under such recognition from said survey of 1803 till 1823; that the survey No. 3333, for Louis Labeaume, with the ensuing patent thereon of 1852, was obtained without any fraud whatever; that the survey No. 3332 for Brazeau's representatives and the ensuing patent thereon of 1852 did not embrace any land lying north of the said south ditch of Labeaume; that the conveyance by Labeaume to Chambers in 1816, through whom defendants claim title, was upon good and valuable consideration, and without any notice of the equities now set up by the plaintiff; that said Labeaume and those claiming under him have had possession of and have used, occupied and enjoyed the premises in controversy from about 1798 to the time of the commencement of this suit. In the face of this positive adjudication and positive finding the plaintiff alleges, in the present bill, precisely the same facts set up in the former suit and adjudicated, to wit:

1st. That Soulard made the survey for Labeaume in 1799, by mistake or design, to include the Brazeau reservation.

2nd. That the confirmation of 1810 to Labeaume and to Brazeau were so made as to include the 4 × 4 arpents of Brazeau within the survey of Soulard for Labeaume.

3rd. That the Brazeau reservation must be located in the Soulard survey, from the relative position and location of the surrounding tracts.

4th. That defendants and their grantors, claiming under Labeaume, are not innocent purchasers; having notice of the reservation being within the Soulard survey for Labeaume, and confederated to procure the patent to Labeaume for Brazeau's reservation.

All of these allegations have been heard, tried and adjudicated in a former suit between the same parties, and upon precisely the same mat-

ters; and that judgment and decree is in full force now, not reversed, vacated or qualified.

The former judgment and decree of the said St. Louis Land Court is therefore conclusive record evidence of all the facts found, and operates as *res adjudicata* upon each and all the points adjudged or decreed in the former suit. All the points of fact passed upon in the opinion of this Court have been passed upon and adjudicated in said former suit between these same parties in a suit for the same land, and the decree therein is final.

(1.) The special verdict upon the facts, and decree thereon being *res adjudicata* is *a complete bar* to any subsequent suit upon the same matters, between the same parties. See Swift's Ev. 17; Ed. 1859, Phillips Ev.; Cowan, Hill and Edwards' notes, vol. 2, pages 17 to 20; Butts *vs.* Starr, 5 Conn. 550, 553; Coit *vs.* Tracy, 8 Conn. 268; Starkie *vs* Woodward, 1 Nott and McCord, 329; Lessee of Parish *vs.* Ferris *et al*, 2 Black, S. C., U. S. 608; 2 Story's Eq., § 1523 and note; Mitford's Ch. Pl. by Jeremy, 236, 8.

The *special verdict* under the code of Missouri of 1849, upon all material issues in the pleadings, is a part of the decree and judgment in the case, and concludes all parties as part of the record. Sutter *vs.* Street, 21 Mo. 157, 9, 160; Freeland *vs.* Eldridge, 19 Mo. 325; Bates *vs.* Bower, 17 Mo. 550; Lewis *vs.* Stafford, 4 Bibb. 320; Farrar *vs.* Lyon, 19 Mo. 122; McLary *vs.* Bonman, 3 Littell, 248; Walsh's case, id. 142; Jarius *vs.* Harris, 20 Mo. 262; Voorhies *vs.* Bank of U. S., 10 Pet. 449; Lytle's case, 22 How. U. S. 193, 207; Montford *vs.* Hunt, 3 Wash. C. C. P. 28.

The former decree also is conclusive of the claims, equities and pretensions of the plaintiff in the former suit in equity as to all the facts found by the Court in that suit upon the hearing that were material in the cause. Perine *vs.* Dunn, 4 John, Ch. 142; Neafie *vs.* Neafie, 7 Johns, Ch. 1; Story's Eq. Pl. § 793; Wilcox *vs.* Badger, 6 Ohio, 406; French *vs.* French, 8 Ohio, 214; Jenkins *vs.* Eldridge, 3 Story, C.C. 299; 2 Daniels Ch. Pr. 753, 4; Holmes *vs.* Remsen, 7 Johns Ch. 286; 2 Daniels Ch. Pr. 1209 and 1193, and notes.

The rule may be considered well settled, that the judgment of a Court of competent jurisdiction, directly upon a particular point, or state of facts, is, as between the parties, conclusive in relation to such point or facts, even though the purpose and subject-matters of the two suits be different; *a fortiori*, where only the same facts are in controversy, as in this case. See cases above cited; also, Lessee of Wright *vs.* Deklyne, 1 Peters C. C. Rep. 198, 202; Canaan *vs.* Greenwords Turnp. Co. 1 Conn. 1, 7; Cist *vs.* Zeigler, 16 S. and R. 282; Gardner *vs.* Buckbee,

3 Conn. 120; Wright *vs.* Butler, 4 Wend. 284, 288. The application of this principle to hinder endless litigation is uniform in England and in this country, whether referring to judgments in the same Courts or to decisions of Courts of concurrent jurisdiction. *Hopkins* vs. *Lee*, 6 Wheat. 109, 114; *Orphan's Court of Pa.* vs. *Goff*, 14 S. and R. 181; *McPherson* vs. *Cunliff*, 11 id. 422. And this rule holds, whether the Courts are of record or not. So long as they act in their rightful spheres, their adjudications are binding upon the parties in future controversies. It is sufficient, if the Courts rendering prior judgments had jurisdiction. Gahan *vs.* Maingay, 1 Irish, T. A. 20, 23, *et seq.*; Gratz *vs.* Lancaster Bank, 17 S. and R. 278, 281; Starkie *vs.* Woodward, 1 Nott and McCord, 329; Cottom *vs.* Cottom, 4 Rand Rep. 192; Hughes *vs.* Blake, 1 Mason, 515; Brown *vs.* Gibson, 1 Nott and McCord, 326; Blount *vs.* Darrah, 14 S. and R. 184, etc.; Kilheffer *vs.* Herr, 17 id. 319; Hume *vs.* Burton, 1 Ridg. Cas., 204, *et seq.*; 2 Stark. Ev. 211, 212; Borden *vs.* Fitch, 15 Johns. 121; Mills *vs.* Martin, 19 id. 33; Latham *vs.* Edgerton, 9 Cowen, 227; Snyder's Lessee *vs.* Snyder, 6 Binn. Rep. 483; Messinger *vs.* Kuiter, 4 id. 97; Blinn *vs.* Campbell, 14 Johns. 432; Sumner *vs.* Parker, 7 Mass. 79; Wales *vs.* Willard, 2 id. 120; Smith *vs.* Rice, 11 id. 507; Cleveland *vs.* Rogers, 6 Wend. 438; Gowill *vs.* Whittier, 3 N. H. 265; Bowman *vs.* Russ, 6 Corr. 234; Slocum *vs.* Wheeler, 1 Conn. 429; Weston *vs.* Weston, 14 Johns. 428; Sherman *vs.* Ballou, 8 Caren, 304; Cunningham *vs.* Bucklin, id. 178; Newdigate *vs.* Dary, 1 Raym. R. 742.

(2.) The facts adjudicated upon in the prior suit are to be considered as beyond all controversy in this suit, and the special verdict and judgment upon them are not only evidence upon such facts in any second suit, but conclusive evidence thereof as to all facts so found and adjudicated upon between the same parties. See 5 Conn. 550; 1 Peters, C. C. 198, 202; 1 Nott and McCord, 329; 1 Conn. 1, 7; 16 S. and R. 282; 3 Cow. 120; 4 Wend. 284, 288, above cited. Besides, if the record shows that the first suit was *apparently* for the same cause of action sought to be litigated in the second, it will be prima facie evidence that such cause of action has once passed *in rem adjudicatem;* and hence the onus will devolve upon the party against whom the record is used to show the contrary.

Phillips *vs.* Bewick, 16 Johns. 136; Hall *vs.* Andrus, 6 Cow. 225; Snider *vs.* Croy, 2 Johns. 227; Wilson *vs.* Hamilton, 9 S. and R. 424; Cutler *vs.* Cox, 2 Blackf. 178; Squires *vs.* Whipple, 2 Vt. 111, 114; Pickett *vs.* Clairborne, 4 Call's R. 99, 106; Young *vs.* Black, 7 Cranch, 565; Lord Bagot *vs.* Williams, 3 B. and C. 339; Roscoe on Ev. 101. And this he shall do in a manner beyond equivocation, by clear and

decisive testimony, which shall remove all reasonable doubt. Seddon *vs.* Tutop, 6 T. R. 607, per Kenyon, C. S.; also Wilson *vs.* Hamilton, 9 S. and R. 424, 429. Not only are prior judgments conclusive as to the facts and subject-matter therein decided, but also of their own rectitude and justice; and no allegation or evidence, tending to impeach them, will be allowed in any subsequent distinct controversy between the same parties. Hartshorne *vs.* Johnson, 2 Halst. 108; Allison *vs.* Ranklin, 7 S. and R. 269, 271; McNeil *vs.* Bright, 4 Mass. 282, 303; Hoyt *vs.* Gelston, 13 Johns. 139, 153; Perkins *vs.* Fairfield, 11 Mass. 227; Dow *vs.* Warren, 6 id. 328, 329; Commonwealth *vs.* The Pejupscut Proprietors, 7 id. 399; Loring *vs.* Bridge, 9 id. 124; Foster *vs.* Jones, 15 id. 185; Hawes *vs.* Hathaway, 14 id. 233; McKinney *vs.* Crawford, 8 S. and R. 351; Hawley *vs.* Mancius, 7 Johns. Ch. 174, 182. See also Marsh *vs.* Pier, 4 Rawle, 273.

The conclusive effect of the former decree in this case, as *res adjudicata*, and as record evidence conclusive upon the facts found, in all subsequent actions and suits, is fully established by the uniform decisions of this Court from its organization down to this term. Hopkins *vs.* Lee, 6 Wheat. 109; Walden *vs.* Bodly, 14 Pet. 156; Thomas *vs.* Lamson, 21 How. 332; Ableman *vs.* Booth, id. 506; Thomson *vs.* Roberts, 24 How. 233; Parrish *vs.* Ferris, 2 Black. 606; Soc. for Prop. of Gospel *vs.* Hartland, 2 Paine's Rep. 536; Wright *vs.* Deklyne, Pet. C. C. 199; Armroyd *vs.* Williams, 2 Wash. C. C. 508; Blount *vs.* Darrach, 4 Wash. C. C. 657; Goddard *vs.* United States, 15 Leg. Int. 333; Aspden *vs.* Nixon, 4 How. 467; Burnham *vs.* Webster, 1 Wood. and Minot, 172; James *vs.* Stookey, 1 Wash. C. C. 330; Wash. Alex. and Georgetown Steam Co. *vs.* Sickles, 24 How. 333; McCormick *vs.* Sullivant, 10 Wheat. 192; Ex parte Watkins, 3 Pet. 193; Kennedy *vs.* Georgia Bank, 8 How. 586; Huff *vs.* Hutchinson, 14 How. 586; Green *vs.* Sarmiento, Pet. C. C. 74; 3 Wash. C. C. 17; Duvant *vs.* Essex Co. 7 Wall. 107.

ESTOPPEL BY BOUNDARY LINE.

The boundary line was established between Labeaume and Chouteau in the year 1798, by the erection of a stockade on the inner embankment of a ditch; on the south line of the 64 arpens (4 × 16) conveyed to Labeaume by Brazeau on May 9, 1798. (Rec. p. 34.) Chouteau was then the owner of the 4 × 4 arps, called Brazeau's reservation, lying between the big mound and Labeaume's southern stockade, which two monuments are 4 arpens and 20 feet apart. (See deed 1816, Rec. p. 39 and 40.) A lime kiln of Brazeau and a field cultivated by him before 1798 were included within the said reservation, particularly described

in each of said deeds as lying at the foot of said mound, and necessarily south of said stockade boundary. (Rec. pp. 187, 190, 191, 192.) The *first* official recognition of this stockade boundary was in the Spanish survey by Soulard for Labeaume on the 10th of April, 1799 (Rec. pp. 36, 292), certifying that it was made in the presence of the proprietors and the adjoining neighbors, Chouteau being the only adjoining owner on the south of the stockade boundary who held Brazeau's lime kiln and fields lying between the big mound and Labeaume's stockade (Rec. 187, 190, 191, 192), by virtue of a verbal sale from Brazeau to him prior to the said deed from Brazeau to Labeaume in 1798. (Rec. 39.) The *second* official recognition of this stockade boundary was on Oct. 15, 1799, in the petition of P. Chouteau to the lieutenant-governor of the province for a grant of land between Antoine Roy's tract and the said stockade line of Louis Labeaume, Chouteau's tract being 19 arpents in length between Labeaume's stockade and Roy's tract, by a depth of 6 arpents westwardly from the Mississippi. (Rec. 141. Map 253: on second page, 141, marked p. 262, meaning marginal page.) On said map of Chouteau's tract, the whole area of Chouteau's tract is exhibited; and at the north boundary of Chouteau's land appears the stockade fence of Labeaume, pictured as the boundary stockade between the tracts of Labeaume and Chouteau; and the following words appear immediately north of the pictured stockade, within the Labeaume tract: "Don Louis Labeaume, fosè que servè dĕ estècado" (that is, "ditch which serves for a stockade"). Below the stockade appear the words, "N. 74. E. 70 p's. Don Pedro Chouteau 133 arpents." This survey was made in the presence of Labeaume and of Chouteau, on June 17, 1803 (Rec. 355, 356); and the said stockade of Labeaume was *thirdly* officially recognized as the common boundary line between the lands of Chouteau and Labeaume upon the official records of the Spanish government. (Rec. 293.) P. Chouteau acquired the inchoate pretensions of the mulattress, Esther, and of Brazeau, covering all of his [Chouteau's] grant to the extent of 4 arpents in depth on the Mississippi, by the length of 19 arpents between Labeaume and Roy (see deeds of Esther to Clamorgan, of Clamorgan to Chouteau, and of Brazeau to Chouteau, Rec. pp. 39, 233, 234) concentrating in Chouteau all Spanish grants south of Labeaume's stockade boundary, down to Roy's tract. The *fourth* recognition of Labeaume's stockade boundary was by deed dated July, 1816, from Brazeau to Chouteau for the said reservation; in which he conveys to Chouteau 4 arpents of land at the foot of the big mound (bounded by the stockade of Labeaume on the north), and declaring that "Louis Lebaume accepted the said deed to him, under the terms and conditions therein

mentioned," and that the land reserved in the deed to Labeaume in 1798 is the same land granted to said Chouteau, and necessarily lying between the said mound and stockade. (Rec. 39, 40.) The *fifth* official recognition of Labeaume's stockade boundary was in an official protest by P. Chouteau to the commissioner of the General Land Office, June 24, 1818, in which he declares his purchase of all the private claims extending up to Labeaume's land; that the location of a New Madrid certificate between the mound and the ditch of Labeaume excites his surprise and regret. (Rec. 107, 108.) This official protest is more definitely applied to Brazeau's reservation by a second protest of said Chouteau to the said commissioner, May 20, 1826, in which he declares that the said New Madrid location covered "the whole of a small tract of 16 arpens which I had purchased from Joseph Brazeau, to whom it had been confirmed by the old board of commissioners, and also part of another tract of 93 $\frac{1}{100}$ arpens confirmed to me by the same board, lying and patented between Roy and the north foot of the mound," and refers to said prior protest of 1818; and again protests against the Peyroux location being made on the land between Labeaume's stockade and ditch and the big mound, because it would cover the Brazeau reservation. (Rec. 108, 109.) The said Peyroux New Madrid location commenced at the southern stockade of Labeaume, and included all the land lying south of that boundary and east of the St. Louis common field to the river Mississippi, to the extent of 160 acres, including Brazeau's reservation, Chouteau's confirmation, and all the other confirmed Spanish grants, to the Spanish town of St. Louis. (Rec. 232.) The *sixth* official recognition of Labeaume's stockade boundary was the United States survey, Feb. 2, 1852, and patent March 25, 1852, for the land in Soulard's survey, which calls for the boundary of the old ditch of Labeaume on the south, the stockade on the top of the embankment then having disappeared and fallen to decay. (Rec. 59 to 72.) The *seventh* official recognition of Labeaume's stockade boundary was the United States survey for Brazeau, Feb. 26, 1852, locating the Brazeau reservation as it had always been located from its creation, south of and adjoining Labeaume's stockade boundary at the foot of the said big mound. (Rec. 155 to 159.)

AS TO THE POSSESSION BY THIS COMMON BOUNDARY

Labeaume enclosed in 1798 the 16 arpens in length, which he had purchased of Brazeau, with a stockade enclosure, made by digging a ditch from the outside about 8 feet wide by 6 feet in depth, throwing the earth to the inside, and raising an embankment, into which were driven pickets forming the stockade. When these pickets decayed, their place

was supplied by stakes and rails. Within this enclosure he built houses for himself and his servants, and held possession, carrying on a farm there from 1798 to 1816, when he sold to William Chambers, who conveyed two undivided thirds of his interest to Christy and Wright, who have held possession within the same boundaries from 1816 to this day. The evidence is absolutely conclusive that this possession was continued within the boundaries of Labeaume's stockade from 1798 to the commencement of this suit by Labeaume and his grantees, claiming up to the old line of the stockade boundary, dividing Labeaume's land from Chouteau's; and that Chouteau and his grantees knew of such possession and claim during the whole period of its possession by Labeaume and his grantees. See Rec. Ev. of Jacques Labbe, 187; Antoine Smith, 190; Survey of Soulard for Labeaume of 1799 (pp. 36, 292, 293); Spanish survey for Chouteau and plat. Rec. 142; Ev. of Joseph Labarge, p. 191; of I. B. Hortiz, p. 192; of Wm. Waddingham, p. 193, 4, 5; Letter of Lapsley, p. 195; Ev. of William Milburn, p. 142, *et seq.*; of Walker, p. 195; of C. G. Hoyt, p. 197; of Neal Walker, p. 198; of Jerusha Walker, p. 199; of Phineas Bartlett, p. 200; of E. Tanner, p. 218; of John T. Walker, p. 230; of M. L. Clark, pp. 93, 94; Protests of P. Chouteau of 1818, and 1826, Rec. 107, 108, 109, declaring the southern stockade boundary to be the ditch of Labeaume. This evidence establishes an absolute acquiescence from 1798 to 1826 by P. Chouteau in the possession of Labeaume and his grantees up to the line of said stockade boundary, dividing the tracts and serving as a common boundary between Chouteau and Labeaume.

The plaintiff is therefore forever estopped from recovery of this land, both in law and equity; inasmuch as the boundary line, to wit, the stockade boundary line between Labeaume, under whom the defendants claim title, and Chouteau, under whom the plaintiffs claim title, was established in 1799 by the Spanish Surveyor General, by his official survey, made in the presence of both the parties then in possession of the land, with their mutual consent and agreement, followed by a possession of the land sued for by the defendants and their grantors from 1798 to this day, and acquiesced in by the grantor of the plaintiff, and declared by him in solemn official documents and deeds to be the true common boundary line of the lands of both parties, for twenty-eight years continuously. See Taylor and Mason *vs.* Zepp, 14 Mo. 482; Lindell *vs.* McLaughlin, 30 Mo. 28; Knowlton *vs.* Smith, 36 Mo. 507; Brewer *vs.* Boston and Worcester R. R. Co. 5 Metc. 478; Talman *vs.* Sparhawk, id. 469; Codman et al *vs.* Winslow, 10 Mass. 155; Stone *vs.* Clark, 1 Metc. 378; Spaulding *vs.* Warren, 25 bb. 316; Clark *vs.* Taber, 28 bb.

222; Ackley *vs.* Buck, 18 Vt. 395; Burton *vs.* Lazell, 16 Vt. 158; Berry *vs.* Garland, 6 N. H. 473; Orr *vs.* Hadley, 36 N. H. 575; Gray *vs.* Berry, 9 N. H. 473; Smith *vs.* McAllister, 14 Barb. 434; Baldwin *vs.* Brown, 16 N. Y. 359; Larerty *vs.* Moore, 32 Barb. 347, and 33 N. Y. 658; Adams *vs.* Rockwell, 16 Wend. 285; McCormick *vs.* Barnum, 10 Wend. 104; Kip *vs.* Norton, 12 Wend. 127; Jackson *vs.* Corlear, 11 Johns. 123; Jackson *vs.* Dyeling, 2 Caines, 201; also, 6 Wend. 467; 7 Johns, 5; Kerr *vs.* Wright, 37 Pa. St. 196; Armstrong *vs.* Risteau, 5 Mo. 256; Walker *vs.* Derlin, 2 Ohio (N. S.), 593; Riley *vs.* Griffin, 16 Geo. 141; Carroway *vs* Chacey, 2 Jones Law (N. C.), 222; Ball *vs.* Cox, 7 Ind. 453; Myers *vs.* Johnson, 15 Ind. 261; Faught *vs.* Holway, 50 Maine, 24; Daggett *vs.* Willey, 6 Fla. 482; Houston *vs.* Sneed, 15 Tex. 307; George *vs.* Thomas, 16 id. 74; Gilchrist *vs.* McGee, 9 Yerg. 455; Moody *vs.* Nichols, 4 Shep. 23; Blair *vs.* Smith, 16 Miss. (1 Bennett), 273; Clark *vs.* Lockwood, 21 Cal. 220; Lebeau *vs.* Bergnon, 14 La. Ann. 489; Boyd's Lessee *vs.* Graves *et al*, 4 Wheat. 513; Rhode Island *vs.* Mass. 4 Howard, U. S. 591; Duchess of Kingston's Case in Smith's L. C 655 to 843, with Hare and Wallace's notes.

CONCLUSIVE RECORD EVIDENCE OF BOUNDARY, AND POSSESSION ACCORDING TO IT.

The special verdict and decree of the St. Louis Land Court, in a case between these same parties and for the same matters, put this question of boundary forever at rest, as follows: Judge Lord finds and decrees in 1858 (Rec. 270, 1, 2), "That the said tract of 4 × 4 arpents of land which was confirmed to said Joseph Brazeau is situate in the northern part of the present city of St. Louis, in the County of St. Louis, on the south side of an old ditch, called and known as Labeaume's south ditch; that said Pierre Chouteau, under whom plaintiff claims title to the land in question, on the fifteenth day of October, 1799, petitioned for a tract of land between Roy and Labeaume of the width of six arpents; that Labeaume's ditches were then made; that Chouteau in his petition called for the line of the land of Louis Labeaume for his northern boundary; that at this time Joseph Brazeau had promised to convey the 4 × 4 arpents to P. Chouteau; that at the time of the survey made in 1803, the south ditch of Labeaume was recognized by all the adjoining proprietors as Labeaume's south line; and that possession was claimed and held with such recognition from the time of said survey, in 1803, until about 1823."

The Court further finds (Rec. p. 272), "That said Louis Labeaume and those claiming under him have had possession of and have used, occu-

pied and enjoyed the premises in controversy from about 1798 to the time of the commencement of this suit."

The said finding and decree of 1858 are *conclusive record evidence of the said facts*, in this and all subsequent suits, and cannot be controverted or disputed. This rule of evidence is never departed from, and has been universally established by a multitude of authorities in Great Britain and the United States. See Phillips' Ev. Cowan, Hill and Edwards' notes, ed. 1859, vol. 2, pages 17, 18, 19 and 20, and cases cited in the notes.

THERE IS NO EQUITY IN THE PLAINTIFF'S BILL.

The State Court was bound to dismiss the bill for this reason alone. The opinion of the Court in this case virtually admits this, by declaring that the Labeaume patent did not convey the 4 × 4 arpents in the southeast corner to Labeaume, and that the new patent of 1862 to Brazeau did convey that identical land, and vest in him the legal title.

If this be so, then Brazeau acquired a legal title to the land sued for, by force of the new patent, and his remedy is strictly at law and not in equity. The plaintiff's bill avers that defendants held the legal title under Labeaume's patent, and asks the aid of the Court in Equity to divest that legal title out of the defendants and vest it in the plaintiff. The opinion of this Court is in direct conflict with the bill, and holds that there is no equity in this case, after the issue of the patent in 1862, on which this suit is founded, in connection with the pretended equities which have no existence, and for the enforcement of which no precedent or authority can be found.

Aside from this opinion, there is manifestly no equity in the bill of which a Court of Equity can take judicial notice, as between these parties. The equity specially alleged in the bill consists, first, in a supposed priority of inceptive right, by reason of the Spanish grant to Brazeau being elder than Labeaume's; second, that the Spanish Surveyor General, by mistake or design, included all of Brazeau's concession in his official survey for Labeaume; third, that the 4 × 4 arpents of Brazeau are in the southeast corner of Labeaume's patent; fourth, that the defendants or their ancestors were guilty of fraud in procuring a survey and patent in 1852 so as to include the 4 × 4 arpents of Brazeau in the southeast corner as aforesaid; fifth, that defendants had notice of Brazeau's equity before they acquired the said land under Labeaume; sixth, that the new patent of Brazeau in 1862 for 4 × 4 arpents in the southeast corner of Labeaume's patent conflicts with it, and that Labeaume's patent is a cloud upon plaintiff's title; seventh, that the patent of Labeaume is older than the patent of Brazeau, and

that the Court ought to divest the title of defendants acquired from Labeaume and vest the same in plaintiff.

The plaintiff's claim of prior equity under the Spanish grant is a mere political equity, of which a Court of Equity can take no cognizance. See Chouteau *vs.* Eckert, 2 How. 371; LeBois *vs.* Brammell, 4 How. 449, 461; Strother *vs.* Lucas, 12 Peters, 410; Menard *vs.* Massey, 8 How. 306; Barnard *vs.* Ashley, 18 How. 44; Garland *vs.* Wynn, 20 How. 6; United States *vs.* Hughes, 11 How. 567; Carroll *vs.* Stafford, 3 How. 441; West *vs.* Cochran, 17 How. 412, 413, 417, upon this same title; *Mackey* vs. *Dillon*, 4 How. 400.

These cases conclusively establish that the Spanish titles of Labeaume and of Brazeau created no judicial equity or title upon which the parties could make any claim at law or in equity in a court of justice. The treaty of 1803, guaranteeing to the inhabitants of the territories of Orleans and Louisiana protection in their property, has been uniformly held by this Court to raise a mere political equity, and to confer no title or right in law or equity which can support any action on Spanish grants like Brazeau's prior to confirmation by the United States. The title must be derived from the United States, and takes effect by relation to the date of the filing of the claim for confirmation; and the patent issued on the confirmation will relate to the filing of the claim, and pass the legal title as of the date of said claim. Landes *vs.* Brant, 10 How. 373; French *vs.* Spencer, 21 How. 228; Ross *vs.* Doe, *ex dem.* Borland, 1 Peters, 664; Beard *vs.* Federy, 3 Wall. U. S. 478; Grezar *vs.* McDowell, 3 Wall. U. S. 380; Stark *vs.* Storrs, 6 Wall. U. S. 402.

These decisions, vesting the legal title by enurement and relation as of the date of the claim, preclude a Court of Equity from taking any cognizance of any equitable title where two patents have issued for the same land, because the priority of the legal title is conclusively determined upon the face of the patent and the record of the board of commissioners by the well-settled doctrine of relation; and the only remedy of an adverse claimant on such a title is at law. Where the claims and confirmations to two different parties for the same land are of the same date, the one in possession must hold. McGill *vs.* Somers, 15 Mo. 80.

In the surveys by the United States Surveyor-General for Brazeau in his behalf, and for Labeaume in his behalf, pursuant to which patents issued in the year 1852 to the respective parties, there is no fraud with which to charge the plaintiff or defendant or their grantors, nor any circumstance to raise a suspicion of fraud. The federal officers simply performed the duties imposed upon them by acts of Congress, commanding them to make the surveys and to issue the patents for the specific

tracts of land described in the respective surveys. 2 U. S. Stat. at Large, 327, 440. This was an exercise of sovereign power which is final and conclusive of the location of the respective grants, and is not open to judicial inquiry. West *vs.* Cochran, 17 How. 413, 417; and cases first above cited. Cases arising under confirmations of Spanish grants by boards of commissioners in Missouri, on which patents have issued, must be carefully distinguished from cases concerning entries, preëmption rights, and New Madrid locations, where the party is a purchaser from the United States for a valuable consideration paid. Where such conflicting equitable rights exist either before or after a patent, a judicial equity arises in favor of the party having the prior entry, preëmption or location, and a Court of Equity will take jurisdiction to protect the better equity which has emanated from the government under acts of Congress. The granting of relief in such cases forms no precedent to support the equities claimed in the plaintiff's bill. Garland *vs.* Wynn, 20 How. 6; Barland *vs.* Ashley, 18 How. 44; United States *vs.* Hughes, 11 How. 567; Carroll *vs.* Stafford, 3 How. 441; Bodley *vs.* Taylor, 5 Cranch, 191; Taylor *vs.* Brown, 5 Cranch, 243.

The equities alleged in plaintiff's bill do not concern any contracts, relations, privities, obligations, trusts, agencies, or any transaction or conduct whatever arising between the parties respecting any right, title or property which had emanated from the United States, and in respect of which the plaintiff had acquired any prior or other equity. Throughout all the proceedings in these claims, the respective parties have acted independently of each other, and have made separate efforts to obtain the complete evidences of their respective titles. All equities existing in favor of either of the claimants, under the former government prior to the confirmations, are merged in the equity or justice of the claims, which were finally decided by the action of the political power of the United States. If any equity could exist prior to the acts of Congress, this Court would have no power or jurisdiction to consider it, and the alleged mistake of Soulard in his survey for Labeaume in 1799 arose in the exercise of the sovereign power of the Spanish government, over which this Court has no jurisdiction; and yet that alleged mistake by the Spanish Surveyor General is the main ground upon which the opinion in this case is based.

The distinction between proceedings at law and in equity, in the State Courts of Missouri, is well established; and under the code of practice, jurisdiction of equity cases has never been taken, except in accordance with the jurisprudence and forms of pleading in Courts of Chancery.

In the opinion of the Court, it is stated "The case was one brought here from a State Court, where the distinction as to the remedy between legal and equitable titles is not observed." (Opinion, p. 33.)

There is no State in the Union where the distinction between the remedies on legal and equitable titles is more strictly observed than in the State of Missouri.

Equity practice and pleading have been retained in Missouri in full force since the organization of the State. *Rector vs. Price*, 1 Mo. 373; *Tesson* vs. *Atlantic Mut. Ins. Co.*, 40 Mo. 33: *Clarkson* vs. *Curly*, id. 114; *Wade* vs. *Beldmeyer*, id. 486; 23 Mo. 50. The distinction between remedies and proceedings in suits at law and equity has always been strictly preserved in Missouri. See cases above cited; also *Pauley* vs. *Vogel*, 42 Mo. 291; *Rutherford* vs. *Williams*, 42 Mo. 18; *McIlvaine* vs. *Smith*, 42 Mo. 45; 21 Mo. 331; *Risher* vs. *Ronsch*, 2 Mo. 95.

To entitle a party to *relief in equity*, there must be some ground for specific relief beyond a mere claim for damages or for the payment of money recoverable only in an action at law. *Rutherford* vs. *Williams*, 42 Mo. 19; 6 Mo. 16; 16 Mo. 457; Rector *vs.* Price, 1 Mo. 373; 4 Mo. 384; 20 Mo. 222. *State ex rel Allen* vs. *St. Louis Cir. Ct.* 41 Mo. 576.

A recovery cannot be had in chancery, on grounds foreign to those stated in the bill. McKnight *vs.* Bright, 2 Mo. 110; nor on a legal title in the plaintiff, where the equitable claim is to divest a legal title vested by a patent in the defendants. See cases above cited. The general charge of fraudulent combination, etc., usually inserted in a bill, is not sufficient; there must be an allegation of specific fraud. *Lewis* vs. *Lewis*, 19 Mo. 182.

The finding and decree of the St. Louis Land Court were, "That the conveyance made by Labeaume to Chambers in 1816, through whom the defendants claim title, was made upon good and valuable consideration, and without any notice of the equities now set up by the plaintiff." (Rec. p. 272.)

The decree of the St. Louis Land Court of the 22d June, 1858, affirmed in the Supreme Court of Missouri, which judgment was affirmed in this Court, was made on a special finding of facts, specially and conclusively barring all relief in equity on any ground stated in the opinion of this Court. (Rec. p. 268 to 272.)

The parties are the same, and the plaintiff's bill is identically the same now as before, except the averment, that a new patent was issued to Brazeau on a survey of 1862; and the answer to the first bill is the same as the answer to the second bill, except as to *res adjudicata* and

the effect of the new patent. The prayers of the two bills of the plaintiff are the same, to divest the right and title of defendants out of them, and vest it in the plaintiff. (Rec. 246 to 255. Rec. 3 to 8.)

The special finding of facts, and the decree thereon of the 22d June, 1858, are conclusive evidence by the record in this case and all others on the same title, of all the facts so found; and all the equities, facts and evidence commented on in the opinion are expressly barred and precluded from any consideration by this Court, by force and effect of the former record, and of this record, which contains the former record specially pleaded as a bar to this action, and given in evidence *in extenso*. (Rec. p. 20, 25; 243 to 311.)

The findings of the St. Louis Land Court in 1858, and the opinion of the Court being exactly opposed on boundary and other questions of fact, the original finding and judgment are conclusive in all Courts forever, and there can be no equity in plaintiff's bill whatever.

DEFENDANTS ARE INNOCENT PURCHASERS WITHOUT NOTICE.

The grantors of defendants, Chambers, Christy, and Wright, were innocent purchasers, in 1816, of all the land in Soulard's survey, including within it the tract sued for, for full value, without any notice of any right, title, claim or equity in favor of Brazeau or Chouteau to any part of the land sued for. This defence is conclusively proved by the record evidence in this case.

Brazeau sold to *Labeaume* in 1798, the 64 arpents included within Labeaume's stockade boundaries for $40. Rec. p. 34. The 4 × 4 arpents reserved at the foot of the big mound was sold by *Brazeau* to *Chouteau* prior to 1798 for $1, Rec. 39, 40; as shown by deed, dated July 26, 1816, reciting the Spanish verbal sale. Rec. 39, 40. On April 27, 1816, Labeaume and wife being in actual possession, conveyed to William Chambers the 374 arpents, according to the Soulard survey for Labeaume, for $7,460, cash in hand paid, with the following *covenants:*

(1.) Of seizin and possession of a perfect estate in fee simple.

(2.) Of authority full and lawful to convey to Chambers, his heirs and assigns.

(3.) Against all incumbrances.

(4.) Of warranty.

Which deed was recorded 3d July, 1816, in records of St. Louis County. (Rec. p. 102.)

On May 4, 1816, William Chambers conveyed to William Christy

and Thomas Wright for $4,973.33 two undivided third parts of the same tract of land, with full covenants. Recorded July 3, 1816. (Rec. p. 105, 106, 107.)

The said purchasers, Chambers, Christy and Wright, entered into the possession of said land, within Soulard's survey, immediately after the date of said deeds, making valuable improvements thereon; and they, their heirs and grantees, have held open, notorious possession ever since, claiming to own the same. (See special verdict, Rec. 271, 2, 3. and the evidence of possession cited under the first point as to the boundary line.)

The foregoing facts conclusively prove,

1. That Mr. Chouteau, the plaintiff's grantor, did know, assert and insist that the Brazeau reservation was specifically located and fixed forever on the land lying south of Soulard's survey and outside of the bounds thereof; and there is no reason to conclude from the evidence that either Chambers, Christy or Wright ever had even a doubt as to these facts. All their acts show they supposed themselves the absolute *bonâ fide* owners of the whole of the land within the Soulard survey, conveyed to them by the said recorded deeds. The plaintiff avers that the defendant bought with notice of an outstanding equitable claim, but brings no proof to establish such an assumption.

These deeds were made prior to the United States survey of 1817. There were then no existing recorded Spanish surveys for the lands north or south of Labeaume's stockade boundary on the river Mississppi, excepting the Spanish surveys made by Soulard, the Spanish Surveyor General, for Labeaume and for Chouteau, of their respective tracts on each side of said stockade boundary, commonly called "Labeaume's ditch," which was made to furnish the embankment for the stockade. No Spanish surveys were ever made for Brazeau or for Esther. The survey of Soulard for Labeaume was recorded in the Registrè D'Arpentage of the Province of Upper Louisiana, April 10, 1799. Rec. p. 293.

The Spanish survey for Chouteau was officially certified by the Spanish government, June 17, 1803, and executed March 10, 1803. (Rec. 141 and 355, 6.)

Chouteau had concentrated in himself all the inchoate claims of the mulattress Esther and of Joseph Brazeau, and admitted, once before the governor of the province, and twice before the Spanish Surveyor General, in official proceedings to which he was a party, that the Soulard survey for Labeaume correctly described the land conceded to Labeaume, and that the land included within it was Labeaume's land. Rec. 141, 355, 6,

36, 292. On July 25, 1816, Rec. 39 and 40, Chouteau accepted a deed from Brazeau for the reservation, locating it between the big mound and Labeaume's ditch. (Rec. 151, 155, 156, 93, 94, 95, 96, 100, 101, 130, 138.)

And afterwards the said Chouteau, in 1818 and 1826, as owner of the Brazeau reservation now sued for, in two official protests to the Commissioner of the General Land Office asserted that the Brazeau reservation was situated between the big mound and the stockade boundary or ditch of Labeaume. (Rec. 107, 8, 9.)

In the conveyances, chain of title and official protests set forth, there are no proofs of any outstanding equities in third parties, to Labeaume's tract as surveyed by Soulard; the deeds are specific, Labeaume taking title to the 64 arpents north of the ditch from Brazeau; and Chouteau, taking title south of the ditch from Brazeau, and each party possessing and improving the land in accordance therewith. Chambers took from Labeaume and wife; Christy and Wright took from Chambers. The chain of title from Brazeau through Labeaume to Christy and Wright is complete for the specific land in Soulard's survey. An examination of the deeds shows conclusively that each vendee was a *bonâ fide* purchaser for a valuable consideration, without notice of any fraud or mistake in the grant to his vendor. In such cases, *bonâ fide* purchasers for value hold the estate against the original grantor and his heirs and all other persons. *Dexter* vs. *Harris*, 2 Mason, 231. Nor has a purchaser, by law, constructive notice of all matters of record, but only of such as the title deeds of the estate refer to or put him on inquiry for (id). Nor will it be competent to charge him, if without notice he purchased of one who had obtained his conveyance by fraud. *Jackson* vs. *Henry*, 10 Johns, 185. It is true the Spanish verbal sale recited in the deed from Brazeau to Chouteau, dated July 26, 1816, was not of record; but the recital in the deed was all-sufficient to bind Chouteau and his grantees; since an explicit notice (as this was) of a former unrecorded conveyance to the purchaser, Chouteau, has the same effect upon him as if the former conveyance had been on record. *Tart* vs. *Crawford*, 1 McCord, 273.

The title of a *bonâ fide* purchaser for a valuable consideration is not to be affected by loose, vague and uncertain evidence of the existence of a prior title, admitted to be unlocated and indefinite; and if a former owner neglects to record his title or assert it by claim or possession, every presumption is to be made in favor of a subsequent *bonâ fide* purchaser. *Boggs* vs. *Warner*, 6 W. and S. 469. This precludes the plaintiff from setting up any unrecorded title against the *bonâ fide* purchasers without notice from Labeaume. See also, *French* vs. *Loyal Co.*, 5 Leigh

627. *Crockett* vs. *Magwire*, 10 Mo. 34; Lodge *vs.* Simonton, 2 Penn. 439; White *vs.* Carpenter, 2 Paige, 217, 253; Connecticut *vs.* Bradish, 14 Mass. 291; Gomedie *vs.* Northampton Water Co., 7 Barr. 233; McNair *vs.* Lot., 34 Mo. 300, 2. *Le Neve* vs. *Le Neve*, 2 W. and T. Lead. Cas. Eq. 116, 120, Am. Ed.; Alexander *vs.* Pendleton, 8 Cranch, 462; Fletcher *vs.* Peck, 6 Cranch, 133. See also the special finding and decree of the St. Louis Land Court (Rec. 272) to the following effect: "That the conveyance made by Labeaume to Chambers in 1816, through whom the defendants claim title, was made upon good and valuable consideration, and without any notice of the equities now set up by the plaintiff."

This finding and the decree are conclusive proof of record that Chambers was a *bonâ fide* purchaser for value of all the land in Soulard's survey, without notice of any of the equities claimed by plaintiff; and in the present action all the evidence of plaintiff to controvert that fact was inadmissible, and without any relevancy, the former decree being conclusive as to those facts. *Coit* vs. *Tracy*, 8 Conn. Rep. 268; *Starkie* vs. *Woodward*, 1 Nott and McCord, 329; *Dennison* vs. *Hyde*, 6 Conn. Rep. 508.

This principle will be found to run through all the cases; that the judgment and decree of a Court of competent jurisdiction, directly upon a particular point, is as between the parties conclusive in relation to such point, though the purpose and subject-matter of the two suits be different; and hence that a judgment or decree may not only be *evidence* but *conclusive evidence* of the facts found, and still be no bar as *rem adjudicatem* to a second action. See Phillips' Ev., Cowan, Hill and Edwards' notes, Ed. 1859, pages 17, 18, 19, 20, and cases cited in notes.

It is impossible to conceive or to imagine how Wm. Chambers, Wm. Christy, and Thomas Wright, in 1816, could have had any notice of Brazeau's claim as one located inside of Soulard's Spanish survey. If they had *inquired* of Chouteau, he would have told them, as he officially informed the commissioner of the General Land Office, that Brazeau's reservation was his land lying south of the Soulard survey, between Labeaume's ditch and the foot of the big mound. As the Supreme Court of the United States in *West* vs. *Cochran*, 17 How. 412, 16, and *Magwire* vs. *Tyler*, 1 Black. 198, 9, held the said reservation to be located conclusively at the same place, in a decision at law and in equity the conclusion is irresistible, that Chambers, Christy and Wright had no notice of this claim of Brazeau, and could by no possibility have had any.

PLAINTIFF HAS NO DERIVATIVE TITLE FROM BRAZEAU.

The plaintiff has no title by deed or otherwise to the Brazeau reservation if it be located in the southeast corner of the Labeaume patent: so that he stands before the Court without any title, claim or equity to any part of the land sued for, embraced by the new patent to Brazeau of 1862.

First. The deed of Brazeau to Labeaume in 1798 (Rec. 34) conveys to Labeaume in the granting clause the whole of his concession, consisting of four arpens of land from the foot of the elevation or mound, commonly called the "Grange de Terre," by twenty arpens in depth, bounded by the Rocky Creek at the end opposite the said mound; east, by the Mississippi River; and west by the royal domain, the said Brazeau reserving to himself four arpens of land, to be taken at the foot of the mound (the place of beginning), in the south part of said land, only selling to this effect sixteen arpens in depth to Mr. Labeaume. The conveyance to Labeaume is of all the land between the big mound and the Rocky Creek. The distance to the Rocky Creek from the foot of the mound on the western line of the Brazeau concession, four arpens from the river Mississippi, is twenty-six and one-half arpens; the concession to Brazeau (Rec. 34) calls for the grant to extend beyond the mound twenty arpens, extending to the environs of the Rocky Creek. The boundary of the Rocky Creek in the said deed is therefore manifestly an error, for the place of beginning controls. *Jackson* vs. *Wilkinson*, 17 John. 146.

The deed, however, from Brazeau to Labeaume conveys the entire concession as eighty arpens of land, being four in width by twenty arpens in depth. If the reservation of Brazeau at the foot of the mound is not included within the 4 × 20 arpens conveyed to Labeaume in the granting clause of the deed, then it does not operate as an exception of any part of the land granted. 3 Wash. R. P. 370; Cutler *vs.* Tufts, 3 Pick. 377; Adams *vs.* Frothingham, 3 Mass. 361, 2; 4 Greenl. Cruise, Title 32, Deed, ch. 21, § 66, vol. II. p. 650, alias, p. 271, 272.

The exception must be certainly described and set down, or it is void for uncertainty. See 4 Greenl. Cruise (above cited). If Brazeau were the owner of the 4 × 20 arpens covered by Soulard's survey of 1799, and the exception is for land at the foot of the mound, according to the words of the deed creating it, then the whole 4 × 20 arpens passed to Labeaume by the deed, and the exception not being described with certainty to lie within the said survey is void. The beginning line controls, to wit: at the foot of the mound; and the reservation must be located there by the description, 4 Tyng, 205; 3 Atk. 9; Dyer, 50; 7

Johns. 217; 18 id. 60; 19 id. 449; 6 Hill, 453; 10 N. Y. 509; 17 Johns. 29; 4 Mass. 196; 6 Cow. 281. The reservation is described with certainty as lying at the foot of the mound, and necessarily south of, and adjoining Labeaume's ditch; and if the reservation as thus described is not within Brazeau's concession, it is void, being on lands of another. Large *vs.* Penn, 6 S. and R. 488; Emery *vs.* Fowler, 38 Me. 99; Chandler *vs.* McCard, id. 564; Marsh *vs.* Marshall, 19 N. H. 301; White *vs.* Miller, 22 Vt. 380; Hunt *vs.* Stull, 3 Md. ch. 24; Marshall *vs.* Bomparte, 18 Mo. 84; Krase *vs.* Scripps, 11 Ills. 98.

The terms of description used in a reservation or exception are subject to the same rules of construction as the same terms when used in a deed; and the reservation or exception in Brazeau's deed of 1798 is to be construed by the Courts precisely as if Brazeau had made the deed to Labeaume for all of his concession, consisting of 4×20 arpens, bounded, etc., as in the deed, without any reservation whatever, and the reservation is to be construed to operate as an exception, precisely as if Labeaume had made a deed back to Brazeau of the same date for 4×4 arpens of land, beginning at the foot of the mound, to be bounded east by the Mississippi. If Brazeau's original concession did not cover the land thus reserved as an exception, Labeaume could have no title to the exception, and could give none to Brazeau. 3 Wash. R. P. 370; 4 Greenl. Cruise, p. 271, 272; Shep. Touch. 77.

Brazeau conveyed the said reservation to Chouteau by deed of 1816 (Rec. 39, 40), as land situated at the foot of the mound called "La Grange de Terre;" and under this deed alone the plaintiff claims title to the land sued for, although the said deed of 1816 does not cover it, or describe it. The testimony of all the witnesses in the case on both sides who speak of the location of the land described in the said deed from Brazeau to Chouteau is conclusive that it is at the foot of the mound, and bounded by the Mississippi River on the east, which necessarily fixes the location south of Labeaume's stockade boundary, precisely where it was patented for Brazeau by the United States in 1852. William Millburn, Surveyor-General, says (Rec. 151): "The deed from Brazeau to Labeaume, according to this deed, I would begin at the foot of the mound; as I understand the words, at the foot of the hill or mound are the same thing. According to the description in this deed, I would locate it about where the United States survey 3332 would place it." This is the survey for Brazeau's reservation of 1852, at the foot of the mound south of Labeaume's ditch (Rec. 155, 159): — "I now take the deed from Brazeau to Chouteau." (Rec. 151, and 39.) "According to this deed, I would begin at

the foot of the mound, about where United States survey 3332 would place it; if any difference, a little south of the survey." N. F. Hyer, plaintiff's witness, testified (Rec. 95, 96):

Q. Can you locate the land thus described, which consists of four arpens of land, to be taken from the foot of the hillock or mound called "La Grange de Terre," by twenty arpens in depth, bounded by the Rocky Branch which is opposite the mound, east by the Mississippi River, and west by the King's domain, the said Brazeau reserving for himself four arpens of land from the foot of the mound in the south part of the tract?

Ans. In that case, I should commence at the extreme northern base of the artificial mound, and continue up to where a line parallel with a line forming the south boundary of the tract would strike the Rocky Branch when produced. The line forming the southern boundary would be a straight line from the mound to the river. I should there locate the reservation at the southern extremity of the 4 × 20 arpens so located.

A. H. Evans, (Rec. p. 100). Same question put to this witness as to Hyer.

Ans. "I should begin at the foot of the mound, at Brookline street, as he (meaning Hyer) says. In surveying, it is customary to take the beginning named in the paper. But starting from the foot of the mound you would never reach the creek with your twenty arpens. Taking that beginning, the west line of the Brazeau tract would fall away from where it is on the map, and the whole tract would contain . . . more than one hundred and twenty arpens."

See also, to same effect, diagram of Wm. H. Cozzens (Rec. 126), and Cozzens' testimony, Rec. p. 121, 122, 123, 129, 130, in which he demonstrates that the Brazeau reservation in the deed to Labeaume can only be located south of Labeaume's ditch at the foot of the mound; also, M. Louis Clark's testimony, that "the beginning point for the reservation is the mound."

The big mound is an artificial erection, and its sides are well defined (Rec. 129, 99, 126). Cozzens testifies, "From the north end of the big mound, along front line of common fields to Labeaume's southern ditch is four arpens and twenty French feet." (Rec. 126.)

In addition to this evidence, the finding and decree in the former suit in equity between these same parties, upon the same identical subject-matter, is conclusive record evidence of the location of the Brazeau reservation in the precise place described by the deed of 1798, and fixes it forever at the foot of the big mound, south of the southern ditch of Labeaume. The judgment and decree on this fact is as follows:

"The Court finds from the evidence the following facts" . . . (Rec. 268): "That afterwards, on the 9th of May, 1798, the said Joseph Brazeau, by his deed of that date, sold and conveyed the said tract or parcel of land conceded and granted to him as aforesaid, to one Louis Labeaume, excepting however, and said Brazeau in his deed reserved to himself, four arpents of said tract of land 'to be taken at the foot of the hillock in the southern part of said land.' . . . (Rec. 269). That the said tract of 4 × 4 arpents of land, which was confirmed to said Joseph Brazeau, is situate in the northern part of the present City of St. Louis, on the south side of an old ditch, called and known as Labeaume's south ditch." . . . Rec. 270.

This finding, and decree upon it, dismissing plaintiff's former bill in 1858 (Rec. 272), is conclusive record evidence of the facts of location of the reservation on the ground, and bars plaintiff's pretentions in this second suit for the same cause of action.

If the deed from Brazeau to *Chouteau* of 1816 could, by any violent construction against the express terms of description, be held to convey the land sued for, it would not operate to convey by force of estoppel or rebutter the after acquired title held by this Court to have vested in Brazeau for the first time in 1862, by force of the new patent. The said deed of 1816 was a mere release or quitclaim, for the consideration of one dollar, and contains no words to pass the said after acquired title by the patent. (Rec. 39–40.) The construction of said deed is to be determined under the principles of the common law, which had been adopted in Missouri in January, 1816. At common law, this deed would not operate by estoppel or rebutter to pass an after acquired title. See Rawle on Cov. for Title (1st Ed.), pp. 335 to 345, and cases cited. Also Jackson *vs.* Hubble, 1 Cowen, 613; Jackson *vs.* Winslow, 9 id. 18; Jackson *vs.* Bradford, 4 Wend. 622; Pelletreau *vs.* Jackson, 11 id. 119; Jackson *vs.* Waldron, 13 id. 178; Kellogg *vs.* Wood, 4 Page, 598; Hoyt *vs.* Dimon, 5 Day, 479; Dart *vs.* Dart, 7 Conn. 250; Fox *et al vs.* Widgery, 4 Greenl. 214; Lowery *vs.* Williams, 13 Maine, 282; Ham *vs.* Ham, 14 id. 351; Baxter *vs.* Bradbury, 20 id. 260; Pike *vs.* Galvin, 29 id. 185; Kimball *vs.* Blaisdell, 5 N. H. 533; Mark *vs.* Willard, 13 id. 389; Middlebury Call. *vs.* Cheny, 1 Verm. 366; Blake *vs.* Tricker, 12 id. 39; Loomis *vs.* Skinner, 3 Pick. 52; Wade *vs.* Lindsey, 5 Pick. 413; Blanchard *vs.* Brooks, 12 Pick. 47; Gough *vs.* Bell, 1 Tabr. 165; Douglass *vs.* Scott, 5 Ohio, 194; Terrett *vs.* Taylor, 9 Cranch, 43; Blight *vs.* Robertson, 7 Wheat. 548; Mason *vs.* Muncaster, 9 Wheat. 455; Lewis *et al vs.* Baird, 3 McLean, 80; Bush *vs.* Marshall, 6 How. 291.

Under the statutes of Missouri of 1825 and 1835, greatly extending

the operation of deeds to pass after acquired titles, this deed would not be effectual to pass such title. Gibson *vs.* Chouteau's heirs, 39 Mo. 566, 569. It is therefore clear that the plaintiff has no title to the land sued for, and according to the opinion in this case, Brazeau and his heirs are held to be the present owners, which might be so, if Labeaume's representatives did not hold the elder patent and sixty-four years' adverse possession.

The Supreme Court of the United States has held, upon this identical title in West *vs.* Cochran, 17 How. 412, 17; and Magwire *vs.* Tyler, 1 Black. 198, that Brazeau's land was located south of Labeaume's ditch, and Labeaume's land was located north of said ditch, which is conclusive upon the question of the respective locations; and also, that the deeds of Brazeau to Chouteau, and of Brazeau to Labeaume, did cover these respective tracts of land and no others. So ruled in *Picot* vs. *Bogy, et al*, 26 Mo. 422.

In Landes *vs.* Brant, 10 How. 348, this Court held "that the patent issued to Clamorgan on a confirmation of 1810," like Labeaume's, "is conclusive evidence that he was the lawful owner of the title thus confirmed, and that he had the best *Spanish* title to that tract of land."

Magwire can have no derivative title to the land sued for, under the case of Picot *vs.* Bogy, 26 Mo. 422.

Note. The reservation of Brazeau as described in the deed of 1798 cannot be located elsewhere than at the beginning point, "the foot of the mound;" but in the briefs of the counsel for plaintiff, it is erroneously stated that the foot of the mound and the foot of the hill are the same, and are at Labeaume's ditch. To support this gross misstatement, the plaintiff introduced a monstrous topographical map, placing the foot of a hill made out of a plain and the mound, four arpens and twenty French feet north of the foot of the *Grange de Terre*, Barn of Earth, the controlling monument referred to in the deed for the beginning. The witnesses on both sides prove without any contradiction or difference that this barn of earth is an artificial erection or mound, with its sides as well defined as a fort or pyramid. It is not built *on a hill*, but on a bank of a prairie, commencing four arpens west of the river, rising about seventy-five feet above the bottom land along the river bank. The mound was made by the Indians as a mausoleum for a chief, and the earth had been taken from the prairie near the mound for this purpose.

Rec. 99. A. H. Evans, plaintiff's witness, testified: "The south side of Brooklyn Street just suits the north foot of the mound." . . . "Every part of the mound was made." At p. 100, 101, this witness locates the Brazeau reservation from the words of the deed in the record, as follows:

"I should begin right at the foot of the mound at Brooklyn Street, as he says." At p. 95, 96, N. F. Hyer, evidence to same effect. He is the witness Mr. Evans refers to in the words, "as he says," *supra.* Wm. H. Cozzens testified as plaintiff's witness. On pp. 121, 122, 123, 126, 127, 128, 129, 135, of his testimony, he fixes the foot of the mound four arpens and twenty French feet south of Labeaume's ditch, and he locates the reservation south of the ditch, and the concession to Brazeau at the foot of the mound, and the 4 × 16 arpens granted to Labeaume between his ditches 16 arpens apart.

Wm. Milburn, Surveyor-General, testifies to same facts (Rec. 148, 9). See also M. L. Clark, 93, 94. These are all the surveyors who testified to location, and they all agree that the deed of Brazeau to Labeaume of 1798 begins at the foot of the earth barn; and all but Clark agree that the reservation must be located south of Labeaume's ditch; and Clark says, "the foot of the mound is all around it, and you could just as well locate it at the south foot or west foot as the north foot." (Rec. 94.)

There is no conflicting testimony as to the true location of Brazeau's reservation, in the deed of 1798, being south of Labeaume's ditch at the foot of the mound. There is a conflict of testimony as to the location of Brazeau's Spanish grant, which calls "for the foot of the hill where the mound stands." But the deed is the instrument creating the reservation, and all concur that the controlling call for the beginning at the foot of *the mound* itself is conclusive, and fixes the reservation south of the ditch, where it has been surveyed by the United States in 1852, under that deed, as required by the confirmation, and patented. This Court has held that survey to be conclusive on all Courts and parties on this same title in West *vs.* Cochran, 17 How.; and in the *United States* vs. *Stone,* 2 Wallace, 525, it was held that such a survey never can be annulled.

The topographical map of plaintiff was made on such a scale as to give the impression to the Court that the mound and bank of the grand prairie formed together *a hill,* with its foot at Labeaume's ditch. This monstrous topographical exaggeration turns the mound on the bank of the prairie into a mountain as steep as Popocatapetl, and the attention of the Court was frequently called to it by the counsel for plaintiff, as a topographical map of the *mound and hill* on which it stands. A bank of the prairie was there with a mound on it, but no hill.

The true map drawn on a regular scale shows the barn of earth 22 $\frac{5}{12}$ feet high on the bank of the prairie, its north and south foot well defined. The bank of the prairie is 75 $\frac{7}{12}$ feet high at the mound above

the river; the south ditch is thirty-six feet above the river. The distance from north foot of the barn of earth to the ditch is 792 feet. The descent of $39\frac{5}{12}$ feet in 792 feet is not the descent of a hill, and if it were it has no connection with the mound. No one would regard it on a map or on the ground as the descent of a hill. But the topographical exaggeration makes this almost level surface a steep mountain side. By the scale, one inch of elevation represents $192\frac{1}{2}$ inches, while one inch of horizontal measurement represents 1,580 inches. The 792 feet has a base of six inches, and the ninety-eight feet, an elevation of about six and a half inches. It makes a mountain out of a plain and a mound.

If this scale were applied to a man six feet high and two feet in diameter, he would be over one thousand feet long, and his body would be thinner than a horse hair, while his limbs would not be visible except under a microscope.

It is by such an exaggeration that this Barn of Earth on the bank of a prairie has been turned into a mountain, and this extraordinary location has been made, against all the testimony in the case, and against decisions in the following cases on the same title. *Magwire* vs. *Vice*, 20 Mo.; *West* vs. *Cochran*, 17 How.; *Picot* vs. *Bogy*, 26 Mo.; *Magwire* vs. *Tyler et al*, 30 Mo.; *Maguire* vs. *Tyler*, 1 Black.; and *Magwire* vs. *Tyler et al*, 40 Mo.

Add to these facts and cases a possession of seventy years by enclosures and houses, a possession of twenty-eight years by a boundary line between Labeaume and Brazeau's grantee, Mr. Chouteau, and the case ought to be clearly understood on the question of the construction of Brazeau's deed.

The facts being absolutely established, the construction of the deed of 1798, as a question of State law, must always be, that the land included in the reservation is to be located at the foot of the Barn of earth, la Grange de Terre, or big mound, according to the words of the deed.

THE LAPSE OF TIME IS A COMPLETE BAR TO ALL EQUITIES, TRUSTS, AND TITLES, CLAIMED BY PLAINTIFF IN THIS CASE, IF ANY SUCH EQUITY COULD EXIST, WHICH DEFENDANTS DENY. If it can be supposed that Chambers, Christy and Wright had notice by construction of law of any antagonistic equity, as that the Soulard survey for Labeaume in 1799, or the confirmation of 1810, included the Brazeau reservation, and after continuous possessions by a boundary line for sixty years, and an adverse possession by innocent purchasers for forty-six years, the

plaintiffs are debarred from setting up this equity by lapse of time, being from 1799 and 1810 to 1862. See Piatt *vs.* Vattier *et al*, 9 Peters, 416; Smith *vs.* Clay, 3 Brown's Ch. 640; Kane *vs.* Bloodgood, 7 Johns' Ch. 93; DeConch *vs.* Saratier, 3 Johns' Ch. 190; Prevost *vs.* Gratz, 6 Wheat. 481; Hughes *vs.* Edwards, 9 Wheat. 489; Wilson *vs.* Matthews, 3 Peters, 44; Badger *vs.* Badger, 2 Wall. U. S. 87; Miller *vs.* McIntyre, 6 Peters, 67; Hunt *vs.* Wickliffe, 2 Peters, 212; Peyton *vs.* Smith, 5 Peters, 493–4; Earl of Deloraine *vs.* Browne, 3 Brown's Ch. 519 and 633. Even supposing that a trust could have been instituted in favor of the plaintiffs, which we deny, the language of Lord Camden is applicable to such a case. "A Court of Equity has always refused its aid to State demands, where the party has slept upon his rights, and acquiesced for a great length of time. Smith *vs.* Clay, above cited. The statutable bar at law is by analogy, or rather in obedience to the statute adopted as a bar in equity. See Ex parte Dewdney, 15 Ves. 496; Bonney *vs.* Ridgard, 1 Cox. 149; Bickford *vs.* Wade, 17 Ves. 97; Townsend *vs.* Townsend, 1 B. Ch. C. 554; Aggas *vs.* Pickerell, 3 Atk. 225; White *vs.* Ewer, 2 Veub. 340; Pearson *vs.* Pulley, 1 Ch. Cas. 102; Johnson *vs.* Smith, 2 Burr. 961; 3 Bro. Ch. 639, notes; Lacon *vs.* Briggs, 3 Atk. 107; 2 Mad. Ch. 241; 1 Sch. and Lef. 109; Vin. Abr. Limitations, T. note; Bickford *vs.* Wade, 17 Ves. 87.

In general, it is a rule that "if the equitable title be not sued upon within the time that a legal title of the same nature ought to be sued upon, the Court, acting by analogy to the statute, will not relieve. Lewin on Tr. 616; Bond *vs.* Hopkins, 1 Sch. and Lef. 429; Medlicott *vs.* O'Donel, 1 B. and B. 166; Cholmendeley *vs.* Clinton, 2 I. and W. 151. An equitable claim to lands cannot be preferred after a lapse of twenty years, from analogy to the statute of James, which fixed the limitation to the prosecution of rights of entry (id).

All the witnesses who could speak of the transactions in 1799, or in 1810, are dead; and it is not competent for the Court to pass upon transactions, trusts, or equities arising more than half a century ago. Johnson *vs.* Johnson, 5 Ala. 97; Atkinson *vs.* Robinson, 9 Lee, 396; Pye *vs.* Jenkins, 12 Peters, 254; Bowman *vs.* Wattle, 1 How. 193; 2 Sch. and Lefrey, 636; 17 Ves. 87; Mitchell *vs.* Thompson, 1 McLean, 106; Crane *vs.* Prather, 4 I. I. Marsh, 77; Picot *vs.* Page, 26 Mo. 413; 4 Yerg. 97; 6 Yerg. 73; *Thompson* vs. *Lyon*, 20 Mo. 155. In cases of trust, where time and long acquiescence (in that case fifteen years) have obscured the nature and character of the trust, or the acts of the parties, or other circumstances, give rise to presumptions unfavorable to

its continuance, a Court of Equity will refuse relief on the ground of lapse of time, and its inability to do complete justice. *Taylor* vs. *Blair*, 14 Mo. 437; *Keeton* vs. *Keeton*, 20 Mo. 530.

This Court in the opinion gives the plaintiff the better equity in this case, on the ground that Soulard's survey of 1799, for Labeaume, included within it the 4 × 4 arpens reserved by Brazeau in the southeast corner of that survey, and that the confirmation of 1810 was made to Brazeau for that reservation in the same place.

Such an equity if it existed would be barred by the lapse of sixty-three years, where the party defendant has been in possession during the whole period. No case can be conceived of where relief will be granted in equity after such a lapse of time. Ang. Lim. §§ 25 to 29; 382; *Cholmondely* vs. *Clinton*, 2 Jac. and Walk. R. 1.; *Elmendorf* vs. *Taylor*, 10 Wheat U. S. R. 168; *Bowman* vs. *Wathen*, 1 How. 189; *Ricard* vs. *Williams*, 7 Wheat. 59; *Piatt* vs. *Vattier*, 9 Pet. 405; *Bradstreet* vs. *Huntington*, 5 Pet. 402.

THE STATUTE OF LIMITATIONS IN MISSOURI IS A COMPLETE BAR TO PLAINTIFF'S RECOVERY.

In the opinion of this Court, it is held that the confirmation to Brazeau of 1810 is valid, and vested a valid right in him to 4 × 4 arpens of land in the southeast corner of Soulard's survey for Labeaume, for which he was entitled to a survey and patent from the United States, which were executed for him in June, 1862.

If this be so, Brazeau had a clear right of action in the Courts of Missouri, on the confirmation, by the statutes of Missouri, from 1825 to this day. See title ejectment, in each of the codes, and Strother *vs.* Lucas, 6 Pet. 783.

Plaintiff sued defendants' tenant on this Brazeau confirmation in the case of *Magwire* vs. *Vice*, 20 Mo. Rep. and the question of location was left to a jury, who found against the plaintiff.

In the Court of the United States, such an action would not lie; because the dry legal title after the confirmation still remained in the United States, to be patented to Brazeau in fee as required by law. But this legal title could be vested at any time in the confirmee, by survey and patent from the United States, which this Court says was done on the 10th of June, 1862.

In the opinion of this Court, it is held that the legal title to the 4 × 4 arpens in southeast corner of Soulard's survey first vested in Brazeau in 1862 by force of the patent to him; but it is also true that the legal title so vested in Brazeau in 1862 must relate back to the confirmation,

and pass the said legal title to Brazeau by relation, as of the 22d September, 1810.

If this relation does not take effect to vest the legal title in Brazeau at the date of the confirmation to him in 1810, then plaintiff has no derivative title under Brazeau for the land sued for (*Gibson vs. Chouteau*, 39 Mo. and cases cited above, under the fifth proposition as to plaintiff's derivative title).

If this relation does take effect, as it must, under numerous authorities of this Court, and vests a legal title in Brazeau in 1810, then the statute of limitations will bar the plaintiff's action in Missouri. *Gibson* vs. *Chouteau*, 39 Mo.; 587; *Gray* vs. *Givens*, 26 Mo. 291; *Lindell* vs. *Cabaune*, 12 Mo. *Biddle* vs. *Mellon*, 13 Mo. 335; McNair *vs.* Lott, 34 Mo. 285; Angell on Lim. § 396, 1 Greenl. Ev. § 16; Clemens *vs.* Runkel, 34 Mo. 41; 20 Mo. 98; 530; 16 Mo. 273.

By the doctrine of relation, the legal title of Brazeau in the land sued for vested in him on the 22d Sept. 1810, by force of the patent of 1862 which refers to the confirmation and the acts of Congress of 1805 and 1807 as the source of his title (Rec. 55 to 58), and vests the legal title in him according to its origin. This doctrine is settled by the decision of this Court in the following cases: *Rutherford* vs. *Green*, 2 Wheat. 197; *Landes* vs. *Blant*, in a parallel case, 10 How. 373; *French vs. Spencer*, 21 How. 228; Ross *vs.* Doe, *ex dem* Borland, 1 Peters, 664; *Menard's heirs* vs. *Massey*, 8 How. 293, 306, 7; *Beard* vs. *Federy*, 3 Wall. U. S. 478; *Grisar* vs. *McDowell*, 3 Wall. 380; *Stark* vs. *Storrs*, 6 Wall. 402, all in point.

So also it has been uniformly held in Great Britain and the several States of the Union. Viner's Abr. Tit. Relation, 290; 1 Johns' Cas. 81; *id.* 85; Caines, 232; 2 Johns, 520; 4 *id.* 234; 12 id. 140; 15 id. 309; *Jackson* vs. *Ramsay*, 3 Cow. 75; Doe *vs.* Hawland, 8 Cow. 277; *Jackson* vs. *Stevens*, 16 Johns, 110; *Williamson* vs. *Field*, 2 Sand. Ch. 533, 568; *Gibson* vs. *Chouteau*, 39 Mo. 587, 8, 9 and 590; *Boyd* vs. *Longworth*, 11 Ohio, 235; *Alexander* vs. *Merry*, 9 Mo. 524; *Crowley* vs. *Wallace*, 12 Mo. 145; *Jackson* vs. *McCall*, 3 Conn. 75; *Han. & St. Jo. R. R. Co.* vs. *Smith*, 41 Mo. 332, 333, 334.

In Walden vs. *Gratz' heirs*, 1 Wheaton, 292, it was held, "That an adverse possession, under a survey, previous to its being carried into a grant, may be connected with a subsequent possession."

In *Gibson* vs. *Chouteau*, 39 Mo. 587 to 591, Mr. Justice Holmes, a jurist of eminent ability, learning and integrity, and now Royal Professor of law in Harvard University, gives the true reasons for the application of this doctrine of relation to the bar of a title, vested by a patent founded

on a prior inceptive right, in a masterly, learned and logical review of all the cases on relation; and the statute of limitations in Missouri was held by the Court to bar a recovery on the inceptive right as well as on the legal title, which relates to the prior inceptive right, and carries the fee to the confirmee as of the date of the confirmation.

The statute of limitations in such a case runs against the title of Brazeau, and not against any title of the United States, which the laws of the United States had vested in Brazeau in 1810.

By the patent of 1862 to Brazeau, it is admitted by the United States that the legal title conveyed by the patent is founded on the confirmation, which was final as against the United States by the fourth section of the act of 3 March, 1807, p. 441, vol. II. U. S. Stat. at Large. The patent is therefore record evidence, that the title granted by it is in pursuance of said acts of Congress, and takes date on the day of the confirmation in 1810, so as to pass the title by force of said acts of Congress of 1805 and 1807.

Congress alone has power to dispose of the public lands, and the title must pass to Brazeau, in accordance with said acts of Congress; and the patent is only evidence that it has passed pursuant to the said acts, directing it to issue on the confirmation. See cases above cited, and also *Stoddard* vs. *Chambers*, 2 How. 316; *Bissell* vs. *Penrose*, 8 How. 317; Menard's heirs *vs.* Massey, 8 How. 293, 306, 7. The patent, therefore, must, under the repeated decisions of this Court, vest the legal title in the confirmee as of the date of the confirmation.

The cases of Stoddard, 2 How. 316 and 8 How. 317, are in point; and establish, that the United States could not grant lands confirmed by the old Board to any other person than the confirmee, for the reason that such rights were vested by law and could not be divested by law or by patent.

In the opinion of the Court, it is further held, that the general saving clause in Labeaume's patent, of all valid adverse rights, reserved Brazeau's land out of the operation of said patent; and that the new patents of 1862 to Brazeau invested him with a title to the premises sued for, and prevented the running of the statute of limitations in favor of defendants claiming under Labeaume's patent of 1852.

It is respectfully submitted that this question does not affect the running of the statute, and so it has been settled by this Court in favor of defendants, upon points not raised in the opinion.

The patent to Labeaume of 1852 covers the land sued for by express terms of description; and this fact appears on the face of Brazeau's patent of 1862 (Rec. pp. 55 to 58), by express recital, that Brazeau's

patent takes a portion of the Labeaume tract at the southeast corner (Rec. p. 57). The point which this Court has failed to notice is, that Labeaume's patent of 1852 gave defendants a color of title under the United States, on which they could maintain their defence under the statute of limitations. The Labeaume patent also related to the confirmation and the filing of the claim (see cases above cited), and passed a good color of title to Labeaume and his legal representatives for the land described in it, which covered the land sued for. The deed from Labeaume to Chambers granted all the land in Soulard's survey in 1816, by full warranty, and gave good color of title to support the defence of the statute of limitations, and was followed by a continuous adverse possession to this day. 10 How. 375, 6.

This Court has held in several cases, that such a patent as Labeaume's, though it be held that it did not convey the better title, by reason of a better prior existing claim or equity under acts of Congress, did notwithstanding "grant a fee simple title on its face, and is such title as will afford protection to those claiming under it, either directly or having a title connected with it, with possession for seven years, as required by the statute of Illinois." *Bryan et al* vs. *Forsyth*, 19 How. 434, and cases *infra*.

The saving clause in the patent of 1862 to Brazeau, reserving all valid adverse rights, refers necessarily to the prior patent to Labeaume, which is stated in the Brazeau patent to be covered to the extent of 4 × 4 arpens by the new patent.

This Court admits that Labeaume's title under his patent and confirmation would have passed and did pass by force of the patent, in accordance with the confirmation of 1810 made under the acts of Congress of 1805 and 1807; but the Court insists that Brazeau had an older claim and equity, because Soulard included the reservation of Brazeau created by the deed of 1798 within the Spanish survey. If this be so, the statute of limitations is nevertheless a complete defence; for the Labeaume patent gave color of title by a well-defined ambit, to which the possession attached and passed a title by limitations.

A patent with a saving clause, reserving all prior rights and adverse claims, does not take away any prior vested rights; but it amounts to a relinquishment of the title of the United States to the land described in the patent, Doe *vs.* Eslava, 9 How. 446; 7 Wheat. 149; and that the patentee's possession from the date of the patent is a complete defence to this action under the statute of limitations. This Court has repeatedly held this same doctrine. In *Ballance* vs. *Forsyth*, 13 How. 18; *Bryan et al* vs. *Forsyth*, 19 How. 434; Ballance *vs.* Forsyth, 24 How. 183;

Gregg *vs.* Forsyth, id.; Kellogg *vs.* Forsyth, id.; Gregg *vs.* Tesson, 1 Black. 150; Forsyth *vs.* Meehan *et al*, 24 How. 175; *Dredge* vs. *Forsyth*, id.; and Kellogg *vs.* Forsyth, 2 Black. 571, this Court held that a much more specific reservation than the one in Labeaume's patent had no effect to prevent the passing of the fee so as to give color of title to the grantee of the United States, and that the statute of limitations would be a complete defence to the party holding under a patent containing such specific reservation, by a possession of seven years.

In the foregoing cases, which were fully considered by this Court for eighteen years, the plaintiff claimed as the legal representative of a French settler in the village of Peoria. By the act of Congress of May 15, 1820, passed to compensate said inhabitants for the burning of Peoria, during the war of 1812, it was provided, "that every person who claims a lot in the village of Peoria, Illinois, shall deliver on or before the 1st of October next, to the Register of the Land Office, a written notice of his claim, to be filed with the substance of the evidence thereof on which the Register was to report the claim with his remarks thereon to the Secretary of the Treasury, together with a list of the claims which in his opinion ought to be confirmed, which were to be laid before Congress." This report was made according to the said act on November 10th, 1820, describing the claim of Forsyth to a block 300 feet square in said village, with specific boundaries admitted to be correct. On March 3, 1823, Congress passed an act as follows: "That there is *hereby granted* to each of the French and Canadian inhabitants and other settlers in the village of Peoria, in the State of Illinois, whose claims are contained in a report made by the Register of the Land Office at Edwardsville, in pursuance of the act of Congress approved May 15th, 1820, and who had settled a lot in the village aforesaid prior to the 1st day of January, 1813, and who had not heretofore received a confirmation of claims or donation of any tract of land or village lot from the United States, the lot so settled on and improved, where the same shall not exceed two acres." The second section of said act required the United States Surveyor to survey the said lots so granted, plat them, and transmit the same to the Secretary of the Treasury, who shall cause patents to be issued to each claimant. The survey so ordered was made in April and May, 1837, by the Surveyor General of Illinois and Missouri, which was returned, approved, and recorded. A patent was issued to Forsyth on said survey, December 16th, 1845; and on this patent he sued the defendant, who claimed that he had entered the land on fifteenth November, 1837, after the return of Forsyth's survey, and obtained a patent in 1838 for the same land, with the following

reservation in the granting clause, "subject however to all the rights of any and all persons claiming under the act of Congress of March 3d, 1823, entitled, 'An act to confirm certain claims to lots in the village of Peoria in the State of Illinois.'" This Court held in the said case of *Bryan et al* vs. *Forsyth*, that "the elder patent to Ballance under the entry was only an appearance of title; but that it was a fee simple title on its face, and is such title as will afford protection to those claiming under it, either directly or having a title connected with it, with possession for seven years as required by the statute of Illinois."

In the case of *Ballance* vs. *Forsyth*, 13 How. 24, it was held, that the French settlers had a better title under the junior patent than Ballance had under the elder patent; because the reservation in the elder patent was sufficient notice that the title to the French lots did not pass; but nevertheless it was held in all the subsequent cases above cited, that the specific reservation in the elder patent to Ballance of the valid rights of the French settlers did not prevent his taking a fee simple by force of his patent which was held to be void as a title against the French settlers, but that he could under such color of title vested by the elder patent defeat the action, upon the valid junior patent to the French settlers on an older equity by force of the statute of limitations, on showing an adverse possession for seven years.

These cases are conclusive, and extend the rule far beyond this case, and establish by authority conclusive in this Court, after many years of examination on this very question, that the statute of limitations, with a possession of ten years under the elder patent of Labeaume, with a vague, general exception of all valid adverse rights, is an absolute bar to the plaintiff's action on his junior patent of 1862.

By any rule of construction known to the law, it is logically impossible to suppose that the general reservation of all valid adverse rights in Labeaume's patent had any reference to any claim or right of Brazeau in the land granted to Labeaume. His claim is not mentioned in Labeaume's survey or patent; and on the same day when Labeaume's patent was issued, March 25, 1852, another patent was issued to Brazeau for land confirmed to him at the foot of the mound south of Labeaume's south ditch, which is conclusive evidence that the United States did not intend to reserve any land for Brazeau within Labeaume's patent. But if it were so, and if the new patent to Brazeau of 1862 conveyed to him the better legal title from the United States for the same land held by this Court to have been reserved out of Labeaume's elder patent of 1852 for the benefit of Brazeau, yet the color of title given to Labeaume by the elder patent for the same land, connected

with an adverse possession for ten years thereunder, is a complete bar by limitations under the statutes and laws of Missouri.

The elder patent to Labeaume was issued the 25th March, 1852, and this suit was commenced the 18th September, 1862, by plaintiff, more than ten years after the United States had invested defendants, as representatives of Labeaume, with a color of title to this land, described by metes and bounds in the elder patent. By the doctrine of relation, this elder patent to Labeaume gave a good color of title to the defendants and their grantors in 1810, so as to invest them with a color of title as of that date, and support the defence of the statute of limitations.

Under all the authorities cited, it is clear that the ten years' limitation in Missouri had run before the new survey and patent for Brazeau of 1862. Labeaume's patent bears date 25 March, 1852, and Brazeau's survey in May, and his patent in June, 1862. The ten years' possession had operated to validate the title of Labeaume before the new patent of 1862 issued, and to cut off all remedies of plaintiff on his alleged prior equities to the same land made valid by his junior patent. *Bryan* vs. *Forsyth*, 19 How. 434, places the decision on this very ground, that prior to the United States survey for the French settlers, Forsyth's title attached to no land, precisely as Brazeau's title is now held to have attached to no land prior to the United States survey and patent of 1862; and this Court held, that the prior judicial equity of Forsyth to the land patented to him by a junior patent could have no effect to prevent the running of the statute of limitations in favor of a holder of the mere color of title under an elder patent for the same land from the United States. The authority of that case on this question has become conclusive on this Court by a long series of decisions to the same effect above cited. It is impossible to distinguish the case at bar from the cases of the French settlers; they are, in fact, precisely parallel: and as this Court has made the defence of the statute of limitations in State Courts and in the federal Courts on such an elder patent a complete defence and a rule of property throughout the United States, on which large and valuable estates depend, the rule so established cannot be overthrown without shaking or destroying the confidence of the people in the validity, wisdom and integrity of judicial decisions.

If the well-settled rule concerning the effect of the doctrine of relation had been applied to the said cases of the French settlers, the title vested by the junior patent of 1845 in *Forsyth et al* would have related back to the confirming act of 3d March, 1823, and have vested the legal title in *Forsyth et al* as of that date, so that the adverse possession of Ballance *et al* under their elder patents of 1838 would be good as a

defence, when so held by mere color of title under a patent giving the outline and ambit of their tracts, and be a bar against the absolute legal title so vested in the French settlers pursuant to an act of Congress, and make the statute of limitations a valid defence. But under either rule the defence of the defendants is complete.

At common law, sixty years, possession creates a perfect title against anybody. 3 Blackstone's Com. 196. By the Stat. 21 James 1st, ch. 5, sixty years' possession bars the crown. Ang. on Lim. 30, § 35.

All equitable claims are barred by twenty years' possession. §§ 25 to 29, Ang. Lim.; § 382 id.

OTHER CONSIDERATIONS.

The decree of the St. Louis Land Court on a special finding of facts and judgment, June 22, 1858 (Rec. 268 to 272), in the former suit for the same lands, between these same parties, on a similar bill for the same identical relief, being still in full force, not reversed, qualified or vacated, *is conclusive record evidence*, not to be controverted in this case, that Brazeau had no valid adverse right to this land sued for, and that Brazeau's reservation was located south of Labeaume's ditch and patent, so that the reservation in Labeaume's patent could not be held to apply to any valid adverse right of Brazeau's. 2 Phill. Ev., Cow. Hill and Edward's notes, Ed. of 1859, p. 18, 19, 20.

In the case of *West* vs. *Cochran*, 17 How. 412, in a suit on this same title, between the grantees of Labeaume and Brazeau, this Court held in 1854, that "in 1810, the Board of Commissioners confirmed the grant to Labeaume, according to Soulard's survey, that being the effect of the confirmation;" "that in Feb. 1799 the Governor granted the land to Labeaume, with the boundaries asked for, and ordered that Soulard, the Surveyor, should put Labeaume into possession, and execute a survey to serve the interested party to obtain a complete title from the Governor General," . . . 17 How. 410. It was further held, "that in March, 1799, Soulard proceeded to survey the land granted to Labeaume, from which the larger quantity of 374 arpens was found to be within the boundaries *described in Labeaume's petition*. The survey was regularly certified, April 10, 1799, and accompanied by a figurative plat." 17 How. 410. "The line marks of this survey have been retraced in the survey recently made by the United States, and the patent to Labeaume or his legal representatives of the 25th March, 1852, is founded on it." *id.* "That a survey was made and patent issued in 1852 for the Brazeau reservation 'at the foot of the mound,' south of Labeaume's tract,

which passed the title for that land to Brazeau in 1852, and *that no other land could be claimed under that confirmation.*" 17 How. 413, 415.

In *Magwire* vs. *Tyler, et al* 1 Black. Rep. 198, 9, (1861), in a former suit in equity on this same title, between the same parties for the same land, on a similar bill for the same identical relief, this Court held, that the Board of Commissioners acting on Brazeau's concession of 1794 "*confirmed to him his* 4 × 4 *arpens, adjoining Labeaume's tract on the south,*" *id.* 198, . . . "and that Brazeau's tract of sixteen arpens should be surveyed agreeably to a reserve made in a sale from Joseph Brazeau to Louis Labeaume." "This survey was to be made conformably to the reservation in the deed, *and that reservation was at the foot of the mound,*" id. 198, 199.

These two decisions are solemn adjudications on this same title and all equities claimed, and establish by authority in this Court, a rule of property under these two confirmations of 1810, precluding the idea that the United States intended or had the power to reserve any right for Brazeau out of the land patented to Labeaume. It is expressly adjudicated by this Court in these cases, that Soulard in 1799 surveyed the land granted to Labeaume by the Governor, and returned his plat of boundaries; that the United States Commissioners confirmed to Labeaume in 1810 the land so surveyed for him by Soulard according to that survey that the United States patent to Labeaume of 1852; is for the same land confirmed, and invests him with the title under the confirming acts of 1805 and 1807; that the confirmation to Brazeau is for the land south of and adjoining Soulard's survey and Labeaume's patent; that no other land can be claimed under the confirmation to Brazeau; and that Brazeau's reservation is at the foot of the mound south of Labeaume's patent, and cannot be located elsewhere.

The acts of Congress of 1805 and 1807, ordering such confirmations, do not authorize any reservations to be inserted in the patents issued on the confirmations. On the contrary, § 6 of act 1807, 2 Stat. at Large, 441, commands the issue of the patent, for the land described in the certificate of confirmation.

The certificate of the commissioners (Rec. 311) on Labeaume's confirmation directs a patent to issue to him for three hundred and fifty-six arpens, "and orders that the same be surveyed, agreeably to a concession from Zenon Tradeau to Louis Labeaume, recorded in book C, page 339, of the recorder's office, by virtue of a concession or order of survey from Zenon Trudeau, Lieutenant-Governor."

This Court having held that Soulard surveyed Labeaume's tract according to the order of survey of Trudeau, and that the confirmation was

according to that survey, which was also held to be identical with the petition of Labeaume and the order of survey by Trudeau thereon, there can be no adverse right reserved within that survey, or the survey and patent of the United States to Labeaume for Brazeau.

The absolute legal title being vested in Labeaume by the patent of 1852, which by relation to the confirmation passed the legal title to him, as of September 1810, there is no reservation for Brazeau within the boundaries of the patent to Labeaume, arising from the general saving of all valid adverse rights inserted in the patent by the Commissioner of the Land Office, without any authority of law.

If it be true, as stated in the opinion of this Court, that Brazeau's 4 × 4 arpens were located and were confirmed to him in the southeast corner of Soulard's Spanish survey, then the said confirmation operated to pass the title to Brazeau in 1810, by relation from the patent of 1862, for that specific tract of land, which would not be *vague or undefined*, but absolutely fixed and certain, in the form of a square, with equal sides, each four arpens long, in the southeast corner of the Spanish survey of 1799.

Whenever a confirmation is for a tract of land that can be located with certainty, the title passes by force of the confirmation alone, and so the title must pass to Brazeau, in 1810, if the theory of the location of his confirmation, as stated in said opinion, be correct. The authorities are conclusive on this question. *Mitchell* vs. *Handfield*, 33 Mo. 438; *Landes* vs. *Brant*, 10 How. 348, 370; *Ott* vs. *Soulard*, 9 Mo. 581, 600, 1, 2; *Berthold* vs. *McDonald*, 24 Mo. 126; *Harrold* vs. *Simonds*, 9 Mo. 323; *Cottle* vs. *Sydnor*, 10 Mo. 763; *Lander* vs. *Perkins*, 12 Mo. 238; *Guyol* vs. *Chouteau*, 19 Mo. 546; *Magwire* vs. *Vice*, 20 Mo. 429; 18 Mo. 492; *Magwire* vs. *Tyler*, 25 Mo.; Grignon's lessee vs. Astor, 2 How. 319; *Chouteau* vs. *Eckart*, 2 How. 344; *West* vs. *Cochran*, 17 How. 413; *Stoddard* vs. *Chambers*, 2 How.; *Bissell* vs. *Penrose*, 8 How.

These considerations and authorities are therefore conclusive, that the defendants have the right to invoke the defence of the statute of limitations of Missouri as a rule of decision here on the Lebeaume patent of 1852 as against all subsequent or prior titles emanating from the United States. *Leffingwell* vs. *Warren*, 2 Black. 593; *Ross* vs. *Duvall*, 13 Pet. 45; McCluny *vs.* Silliman, 3 Pet. 270.

The evidence in this case is clear, that defendants and their grantees have been in possession of the land sued for sixty-four years before this suit was brought. This Court, as early as 1853, held in *Gamache* vs. *Piquinot*, 16 How. 468, that " we feel exceedingly indisposed to disturb

the State decisions" on questions arising under land laws peculiarly local to the State of Missouri.

How much more careful ought this Court to be not to overrule well-considered decisions, based on "a rule of decision," as held in *Leffingwell* vs. *Warren*, 2 Black. 599. The Supreme Court of Missouri for many years has established as "a rule of decision" that the statute of limitations in such a case as this is a complete defence; and so it should rest, for the security of titles and possessions held for sixty-four years in good faith, under the public surveys of the Spanish and American governments, by houses, enclosures and actual improvements on the land during the whole period.

THE COURT OF COMMON PLEAS OF ST. LOUIS COUNTY HAD NO JURISDICTION OF THIS CASE, under the constitution and laws of the State of Missouri; *and the decree rendered by that Court, and ordered to be affirmed by this Court, is null and void ab initio.*

Amendments to Const. of Mo. § 2, Art. 1, Rev. Code, 1855, p. 90, vests "The judicial power as to matters of law and equity in a Supreme Court, in Circuit Courts, and in such inferior tribunals as the General Assembly may from time to time ordain and establish. (Ratified 1822.) The General Assembly may establish Courts of Chancery. (*id.*) The Circuit Court of St. Louis County was "vested with original exclusive jurisdiction in all civil cases which shall not be cognizable before the County Courts and Justices of the Peace." Rev. Code of Mo. 1845, p. 330, § 6.

It was also vested with "exclusive original jurisdiction in each county in which they may be held as Courts of Equity, in all cases where adequate relief cannot be had by the ordinary course of proceedings at law." (*id.*) The Circuit Court was therefore vested with exclusive original jurisdiction in equity cases, as the Court of Chancery referred to in the constitution.

The Common Pleas was established as an inferior tribunal, having jurisdiction in civil cases, to the extent of $500 in 1840. On Nov. 24, 1855, the jurisdiction of the Common Pleas Court of St. Louis County was enlarged as follows: "Concurrent original jurisdiction with the Circuit Court in all civil actions of every nature and kind whatever, and concurrent original jurisdiction with justices of the peace in all civil actions not exclusively cognizable before a justice of the peace. (Rev. Code, 1855, vol. 2, 1587, § 2.) This section confers no jurisdiction in equity, which had been previously vested in the Circuit Court by the act of 1845. (Rev. Code, 1845, p. 330.)

On Dec. 12, 1855, the General Assembly of Mo. vol. 2, Rev. Code of 1855, p. 1592, repealed and restricted the jurisdiction of the Common Pleas in civil cases, by creating a Land Court for St. Louis County, and giving it exclusive original jurisdiction over all the land cases in law and equity, as follows: "The St. Louis Land Court, established for the County of St. Louis, shall have exclusive original jurisdiction in the following cases: "In all actions, instituted in the County of St. Louis, for recovering the possession of any real estate therein; for enforcing any right, claim, demand or lien to or upon the same; for making partitions thereof; for quieting the title thereto; for enforcing the rights and obligations of lessors and lessees, and their respective assignees; or recovering damages for injuries and wrongs thereto, and staying waste thereof; (and) concurrent jurisdiction with the Circuit Court for the collection of demands, whose consideration is real estate or any interest therein; *provided*, however, that the jurisdiction hereby conveyed shall not take away the jurisdiction in like matters conferred upon justices of the peace, the Law Commissioner's Court, or Probate Court in said county."

Con. Sec. 6, art. 5, gives to the Circuit Court "exclusive original jurisdiction in all civil cases which shall not be cognizable before justices of the peace, until otherwise directed by the General Assembly." This did not confer any jurisdiction in equity which had already been vested in the Circuit Court as an exclusive jurisdiction." Art. 5, § 11 Const. of Mo. Rev. Code of 1855, p. 77, § 11. These statutes, under the constitution, leave no jurisdiction in the Court of Common Pleas in land cases, or in equity cases.

§ 7 of the act to establish the Land Court, Rev. Code, 1855, p. 1593, provides that, "cases pending before said Court may be removed into the St. Louis Circuit Court, for the same causes, and in the same manner as causes may now be removed from the St. Louis Circuit Court to the Court of Common Pleas of said county."

The Circuit Court is the Court of original equity jurisdiction, and of original jurisdiction in civil cases. Const. of Mo. Rev. Code, 1855, art. 5, § 6, 11, and 1; § 8, art. 5, gives the Circuit Court superintending control over all inferior Courts. Under the Laws and Const. of Mo., the common pleas had no jurisdiction of this case.

Magwire, the plaintiff, desired Reber to try this case for certain reasons, and changed the venue to effect this object; but the Court of Common Pleas having no jurisdiction over the case, its decree is null and void *ab initio*.

The Court of Common Pleas, although a Court of record, was an infe-

rior tribunal, and its jurisdiction must appear on the face of the record. By the law of Missouri, even the jurisdiction of the Circuit Court must appear on the record and in the constitution and laws of the State, or its judgments are void; and this question may always be inquired into. *Hannibal and St. Lo. R. R. Co. vs. Mahoney*, 42 Mo. 467. This rule has been established for centuries in all countries where the common law prevails; and wherever it appears that a Court has no jurisdiction, its decisions will be utterly void. See Borden *vs.* Fitch, 15 John, 121; Mills *vs.* Martin, 19 id. 33; Latham *vs.* Edgerton, 9 Cowen, 227; Blin *vs.* Campbell, 14 Johns, 432; Sumner *vs.* Parker, 7 Mass. 79; Wales *vs.* Willard, 2 id. 120; Smith *vs.* Rice, 11 id. 507; Cleveland *vs.* Rogers, 6 Wend. 438; Gorrill *vs.* Whittier, 3 N. H. 265; Bowman *vs.* Russ, 6 Cow. 234; Slocum *vs.* Wheeler, 1 Conn. 429; Weston *vs.* Weston, 14 John, 428; Sherman *vs.* Ballou, 8 Cowen, 304; Cunningham *vs.* Bucklin, id. 178; Newdigate *vs.* Dary, 1 Raym. 742; *Noyes* vs. *Butler*, 6 Barb. 613; Rhode Island *vs.* Mass. 12 Pet. 720.

The Court of dernier resort in every State decides upon its own jurisdiction and the jurisdiction of all the inferior Courts to which its appellate power extends. *Davis vs. Packard*, 8 Pet. 323.

Even a plaintiff may assign for error the want of jurisdiction of the Court to which he has chosen to resort. It is the error of the Court to hold jurisdiction when it has none. Opinion by Chief Justice Marshall in *Capron* vs. *Van Noorden*, 2 Cr. 126.

ESTOPPEL BY ACCEPTANCE OF SURVEY OF UNITED STATES.

There is another defence in this case, of estoppel, by acceptance of the survey of the United States, for the reservation at the foot of the mound south of Labeaume's ditch, by the grantees of the Marine Railway Company.

The chain of title of plaintiff is:

First. The verbal sale of Brazeau to Chouteau in 1798 of this reservation, first stated in deed of Brazeau to Labeaume of 1798, and the confirmation of it in 1810, according to the reservation in said deed.

Second. Deed from Brazeau to Chouteau of the reservation at the foot of the mound, on 29th July, 1816, reciting the old verbal sale. (Rec. 39, 40.)

Third. Deed from Chouteau to Strother of 1st June, 1826, for the reservation. (Rec. 41.)

Fourth. Deed from Strother to the Marine Railway Company's trustees for the reservation. (Rec. 42.)

Fifth. Deeds of the Marine Railway Company to Ann Biddle, Peter Lindell, and John Mullanphy's representatives on 5th November, 1841, for all the lands in Brazeau's reservation as then located south of Labeaume's ditch. (Rec. 159 to 167.)

Sixth. Decree of Supreme Court of Missouri vesting the title in the trustee of Ann Biddle for the land south of Labeaume's ditch, in a suit in equity, wherein the Court decrees between the grantee of Magwire and of Chouteau, L. V. Bogy *et al*, and the grantees of the Marine Railway Company, that the title is vested in the grantees of the Marine Railway Company as the owners of the Brazeau reservation, south of the ditch at the foot of the mound. *Picot, trustee of Ann Biddle*, vs. *Bogy et al*, 26 Mo. 422.

Seventh. Deed of Marine Railway Company to John Magwire of the same reservation, north of the ditch of Labeaume, January 2d, 1852. (Rec. 46.)

Eighth. A champertous agreement of Magwire with said Marine Railway Company, that he would prosecute suits at his own expense, for the recovery of said land, for three-fourths thereof, dated 2d January, 1852. (Rec. 242.)

Ninth. Deed from John Magwire to Louis V. Bogy for all the Brazeau reservation wherever situate, dated 1846. (Rec. 240.)

Tenth. Deed of Bogy to Magwire, of 1846, for 4×4 arpens of land north of Labeaume's ditch. (Rec. 315.) The two last deeds have no effect on the title.

Eleventh. Deed of Strother's administrator to Magwire for $315, for this reservation north of the ditch, on a sale the 4th of May, 1846. (Rec. 45.) This deed is of no validity, for Strother had sold all the land he had acquired of Chouteau to the Marine Railway Company in 1830.

It appears from the chain of title, that the Marine Railway Company and its grantees were the legal representatives of Brazeau's reservation wherever it was situated. When the United States survey of 1851–2 for Brazeau was made south of the ditch, the grantees of said Railway Company accepted the survey and patent, and demanded the patent of the Recorder of Land Titles of St. Louis. Rec. 153, 312. These parties used the Brazeau patent in said suit of *Picot, trustee of Ann Biddle*, vs. *Bogy et al*, 26 Mo. 422; and the Court held that Mrs. Biddle, grantee of the Marine Railway Company, was the legal representative of Brazeau's reservation, and entitled to hold her lots under that patent.

But the Marine Railway Company having accepted the survey and patent for Brazeau's reservation south of the ditch, the stockholders of that Company, some of whom had accepted the said survey for Brazeau

of 1852, ordered an agreement to be made with John Magwire on 2d January, 1852, stated in eighth subdivision above. (Rec. 242.)

The law is well settled, that an acceptance of an United States survey of a confirmation by the parties interested, or either of them, operates as an estoppel against the same parties claiming land under the same confirmation in another place. *Menard's heirs* vs. *Massey*, 8 How.; *Carondelet* vs. *St. Louis*, 1 Black.

In the former case of *Magwire* vs. *Tyler et al*, 30 Mo. the Supreme Court of Missouri held that the Marine Railway Company was estopped from claiming the reservation of Brazeau north of the ditch, and that in equity such claim ought not to be enforced. (Rec. 305.)

In conclusion, it is submitted to the Court:

First. That the judgment and decree of the Supreme State Court, having been rendered on a full hearing under the established equity practice in Missouri, as held in *The State ex rel Allen* vs. *The St. Louis Circuit Court*, 41 Mo. 576, 7, 8, and other cases above cited; and the judgment and decree of the Supreme State Court, as a Court of *original* and appellate jurisdiction, being a general judgment reversing the decree of the common pleas and dismissing the plaintiff's bill, — all presumptions in favor of the validity of said judgment, may be invoked by the defendants, and, if any defence stated in the answer and referred to in the proofs appears to have any validity under the local laws of the State of Missouri, this Court is precluded by the Constitution of the United States, Art. 3, § 2, the 25th section of the judicary act, and multitudinous decisions in cases first above cited, fro m re-examining such defences under State laws, and from making any decision in this case which will in any way, directly or indirectly, affect said defences under the State laws and decisions of the State Courts thereon. And the burden of proof is on the plaintiff to demonstrate beyond all doubt that no defence that might be approved by the Supreme State Court in this case was approved by the said Court.

In view of the many defences under State law in this case, both at law and in equity, which have been held valid by the State Courts of Missouri in this case and many others on the same questions, it appears impossible to say that the decision of the State Court is not founded on some one of those defences under local law, and therefore the judgment of the State Court is conclusive and not re-examinable on those questions.

Second. That the defences under State local law and rulings in equity stated and argued in this brief, are conclusively established by the

record and by the decisions of all Courts of law and equity, directly upon the said defences; and although this Court has referred to three defences in this case under State law, and has incidentally remarked that they are not valid defences under the laws of Missouri, yet as this Court in the opinion in this case has held that jurisdiction can only be exercised in the Supreme Court of the United States over federal questions, and that each and every question under State laws is not re-examinable in this tribunal, it is supposed that the brief references in the opinion to those questions of State law would not be held to be an adjudication upon them; for the reason that in another part of the opinion it is held, that the case of *Magwire* vs. *Tyler*, 1 Black. 198, on the same title between these same parties, did not bind this Court on such questions of State law, but was to be strictly confined and limited as an authority to the single question arising under federal statutes "as to the validity of Brown's survey of 1817." The former case of *Magwire* vs. *Tyler*, 1 Black. 198, involved all the questions and defences under State law that are now relied upon, and they were all passed upon in the State Court by a special finding of facts under the code of 1849, on which a judgment was rendered, making the judgment and decree on the said finding a part of the record. (Rec. 272.)

From the opinion in this case, it would seem to be a necessary conclusion that the said defences under State local laws in Missouri were not re-examinable in this Court; and the affirmance of the judgment in favor of the defendants by this Court in the former case between these parties would leave the former decree of the State Court in full force and effect, not to be reversed or vacated, directly or indirectly, by any judgment, decree or decision in any subsequent case between the same parties.

Third. The effect and operation of said former decree of the State Court, in this suit between the same parties, would be a question of State local law, over which this Court can exercise no revisory powers. That decree is therefore conclusive of all the questions of fact on which the decision in this case is based, and cannot be re-examined here or elsewhere, under the repeated decisions of all our Courts, State and federal, and the rulings of the Courts in England for centuries past.

Many defences under State law were held by the State Court to be valid in said former suit between these parties; and upon all such defences it is virtually admitted in the opinion that this Court has no jurisdiction to re-examine them. Those defences are: estoppel by boundary line; no derivative title in plaintiff under the deeds; no equity; if any equity, it is barred by laches; estoppel of Chouteau to claim this land under

his protests in the General Land Office; defendants are *bonâ fide* purchasers for value without any notice of the equities set up; Brazeau's reservation does not cover the land sued for; Labeaume's patent does cover the land sued for, and was according to the confirmation; the statute of limitations; the title by relation in Labeaume in 1806 to the extent of Soulard's survey, and others.

It cannot be conceived that this Court intended to pass upon or adjudicate these or any other questions of State law, over which it is admitted in the opinion and declared in so many decisions, this Court has no jurisdiction.

Fourth. But the order to affirm the decision of the Court of Common Pleas does, in fact, overrule and adjudicate upon all of said defences and the conclusive estoppel of *res adjudicata.* This order is supposed to have been entered, at the close of the opinion, without a full consideration of its effect and operation. It is manifest that said order ought not to be issued under the rules and practice of this Court, uniformly observed and adhered to since its organization; and now, when it is brought to the attention of the Court, that it has no jurisdiction over the questions of State law, which the execution of that order would directly pass upon and adjudicate, adversely to the judgments and decrees of the State Court on local laws, it is presumed this Court will revoke it, and leave the parties to the forum having jurisdiction in the premises, according to the usual practice in like cases.

Fifth. It now appears that the Court of Common Pleas had no jurisdiction of this land case, either at law or in equity, and no jurisdiction to try it, on change of venue from the St. Louis Land Court. A further question arises, if said Common Pleas had possessed jurisdiction over the cause. The order directs the Supreme Court of Missouri to affirm the decree of the common pleas; but, by the practice in equity cases, the appeal to the Supreme Court with a supersedeas vacates the decree of the inferior tribunal, and the whole cause is to be heard and tried *de novo* on the pleadings and proofs in the case before the appellate tribunal. *State ex rel Allen* vs. *The Circuit Court of St. Louis County,* 41 Mo. 576, 7. On the hearing of such an appeal as this in an equity case, the Supreme Court of Missouri exercises jurisdiction *de novo* over the whole case, and, as the record shows, entered a new decree, after reversing the decree of the common pleas. This new decree vacates and annuls the decree of the inferior Court, as if it had never been made.

At the time this new decree on a new hearing was made, the Common Pleas Court had been abolished by the new constitution of 1865, 6, and a new Court had been established in St. Louis County, having full juris-

diction in law and equity over all cases. The Supreme Court of Missouri could not execute the order of this Court, for there is no existing decree of the common pleas to be affirmed, and the Court itself is abolished, and no execution could issue from any Court if the order were obeyed.

Sixth. This Court has no power under the judiciary act or the Statute of 1867 to order the Supreme State Court to enter up a decree for the plaintiff in that Court, in this case; for by the laws and practice in Missouri, the Supreme State Court cannot enter a judgment or decree in an equity case, except on a hearing *de novo.* That Court must exercise original appellate jurisdiction and judicial judgment in such cases; and on all such questions of State law it has exclusive jurisdiction on appeals, and the undoubted right to exercise judicial discretion. This Court ought not to place that tribunal in the position of performing a mere ministerial act, in a case where the judges are bound by their oaths to exercise their judicial judgment and discretion, according to the laws and practice in Missouri; so that if this Court adheres to its decision on the questions of federal law involved in this case, the order should be limited to the questions of federal law, and remand the case to the Supreme Court of Missouri, for proceedings in conformity with the opinion on questions of federal law.

Seventh. It is solemnly and earnestly urged before this Court, that the exercise of the extraordinary and extra judicial powers assumed by this Court in this order for judgment would concentrate all judicial power in land cases where titles originate under acts of Congress in the Federal Supreme Court, and produce a revolution in the judicial system, which would tend directly to the overthrow of the federal constitution, and the ultimate destruction of the government.

BRITTON A. HILL,

Of Counsel for the Defendants in error.

St. Louis, Oct. 1, 1869.

Supreme Court of the United States.

JOHN MAGWIRE

vs.

MARY L. TYLER ET AL.

MOTION TO REFORM JUDGMENT.

As preliminary to the consideration of the motion to reform the judgment entry directed in this case, it is proper to understand the nature and character of the controversy which the Court was called on to decide.

Brazeau and LaBaume claimed that their incipient titles had been confirmed in 1810. At an early day a dispute arose as to the location of the 4×4 arpens which Brazeau in his deed to LaBaume had reserved. This controversy was carried on in the Land Office to whose jurisdiction it properly belonged, until finally, the case having been taken by appeal to the Secretary of the Interior, a decision was made by him in 1851, which confirmed the pretensions of LaBaume, and located Brazeau south of his south ditch. A survey and patent certificate, expressing on its face to have been made in conformity to this decision of the Secretary, were given to LaBaume, upon which a patent was issued in 1852, reciting that it also was made in conformity to this decision of the Secretary.

This patent contained a reservation saving "any valid adverse right which may exist to any part thereof."

On the argument, I endeavored to maintain that the decision of the Secretary of the Interior, thus referred to by the patent, (and so made a part thereof,) having settled the question of conflicting locations between these parties, that by no just construction could the reservation of "valid adverse right," be held to refer to the claim of Brazeau, for such construction would nullify the whole effect of the decision, made for the sole purpose of closing the controversy, and leave the war between the parties as flagrant as ever.

This argument failed to meet the approbation of the Court, and the reservation was held to protect Brazeau's interests whatever they might be.

In 1862, Brazeau made another appeal to a succeeding Secretary of the Interior, who, deciding "that in cases of doubt and so much uncertainty, it appeared most reasonable that the party asking the survey should be *permitted to elect upon which tract he would have it made*," ordered a survey to be made accordingly.

The survey was made, and a patent certificate issued in conformity to these instructions, which located Brazeau within the limits of LaBaume's patent of 1852, and these were followed by a patent to Brazeau, which contains the *same reservation in the same words* as is found in the patent to LaBaume

It is evident, therefore, that the same rule of construction applied to the reservation in the former patent, applied to the reservation in the latter; and that the sole effect of both patents was to vest in the parties formal titles to the same land, leaving them to adjust their conflicting claims before the judicial tribunals of the country. LaBaume never denied that Brazeau had a claim for 4×4 arpens, and Brazeau never denied that LaBaume was entitled to 16×4 arpens; the sole matter in dispute was the *location* of Brazeau.

It is, therefore, apparent that in 1852, when the patent was issued to LaBaume, if that patent included Brazeau's land, he had a clear case of equitable action to have the title conveyed to him, and his situation was not bettered at all by the issue of the patent in 1862, *more than ten years subsequently*.

In December, 1862, Magwire, asserting the Brazeau title, filed his petition, in the nature of a bill in equity, in the St. Louis Court of Common Pleas. The defendants filed answers denying the validity of the title, and setting up various defences--such as the pleas of *res adjudicata*, the statute of limitations, estoppel by reason of the mutual adjustment of boundaries, and long acquiescence therein, *bona fide* purchasers, &c., &c.

The Common Pleas decreed in favor of the complainant, referred the question of rents and profits to an auditor, and finally, on coming in of the report with the exceptions thereto, overruled the exceptions, and entered a decree for a very large amount of rents.

The case was then taken by appeal to the Supreme Court of the State—which had an admitted jurisdiction to pass upon the whole case, and either reverse, affirm, or modify the decree below. It was thus disposed of:

"The Court doth consider and adjudge that the judgment rendered herein by the said St. Louis Court of Common Pleas be reversed, annulled, and for naught held and esteemed; that *this cause be dismissed*, and that the respondent take nothing by his suit, but that the appellants go thereof without day, and recover of the respondent their costs and charges herein expended, and have execution therefor."—(Rec., 350.)

From this judgment a writ of error was sued out under the 25th section, and the cause being here, a motion was made to dismiss for want of jurisdiction, on the ground that the answers involved many defences not cognizable in this Court, and that by the judgment of the Supreme Court of

the State, it was not apparent that it passed on any question of which this Court had jurisdiction. That it was not sufficient to say that the judgment *may* have been rendered on the denial of an authority or right derived from the Government, but it must be shown affirmatively *that it could not have been rendered without so deciding.*

This was overruled in the opinion rendered on the merits, the Court holding "that as it was certain that Federal questions were involved, and that none of the other defences afforded a legal answer, the Court would not presume that these defences had been erroneously decided to defeat their own jurisdiction."

In passing on the merits of the case, the Court confines its opinion to the jurisdictional limits assigned by the Constitution and the act of 1789. The validity of the title, as derived from the Government, is all that is decided by it.

What the Court says about the statute of limitations, and the other special defences made in the Court below, is not to be taken as *decision.* These questions were not and could not be argued in this Court, because by the limitation of jurisdiction the Court is forbidden to "regard" them. They belonged exclusively to the State Court, which was alone authorized to hear and determine them.

The case may be thus stated: If the judgment of the State Court had shown that it was rendered on either or all of these special defences, the motion to dismiss must have prevailed. But, as it is not stated on what ground it was passed, the Court would not *presume* it was given on defences which, in their *opinion*, were illegal, and so defeat their jurisdiction.

This *presumption of argument* may be right enough on the question of ousting the jurisdiction, and yet the *fact* may be otherwise.

Whether, in fact, the Supreme Court of the State passed upon these questions may be denied; but there can be neither doubt nor denial of the fact that these defences were

made in the Court of the first instance, and are now apparent on the Record.

Nor can there be denial of the position that this Court has no jurisdiction judicially to determine them.

When an appeal was taken to the Supreme Court of the State, the appellants had the right to the judgment of that Court upon all the pleas and defences set up in their answers, if the exigency of their case should require it.

Now, either that Court did render their judgment on these defences, or it did not. If it did, then this Court had no jurisdiction of the cause. If it did not, then the appellants have still a right to the judgment of the only Court authorized to decide them, the Supreme Court of the State of Missouri, and no *opinion* of this Court as to the invalidity of these defences can authorize a deprivation of that right.

The ground of complaint is, that the entry of judgment directed to be made not only concludes the appellants on the question over which this Court has an admitted jurisdiction, but on questions over which it has no pretence of jurisdiction. It directs the Supreme Court of the State "*to affirm the decree of the St. Louis Court of Common Pleas.*"

If this be carried out, then it is evident the appellants will be denied the benefit of an appeal to the Supreme Court of their State from the decision of a subordinate State tribunal.

The very ground upon which this Court has taken jurisdiction of the case is, that the judgment reviewed proceeded on a denial of the validity of the title set up by the petitioner Magwire. If this be true, then, as it was unnecessary to consider the special defences, we may safely assert *they never were considered.*

Take the matter of the rents and profits. Is it not evident that this question was never considered by the Supreme Court? How, then, can this Court direct the affirmance of a judgment on a question which has not been

considered by that Court, and which is clearly beyond their own jurisdiction?

The appellate jurisdiction of the Court is granted, with "such exceptions and under such regulations as the Congress shall make."

The 24th section of the act of 1789 provides, that when a judgment or decree is reversed in the Circuit Court, that Court shall "*render such judgment or decree as the District Court should have passed.*"

This does not authorize the Circuit Court to remand the case with instructions to the District Court, but, on the contrary, to enter in its own Court the proper judgment.

The same section further provides, that when the reversal is in the Supreme Court, (except in a specified case,) that Court "*shall do the same on reversals therein.*" That is, the Supreme Court is itself to render the proper judgment, and not to remand it with instructions.

The only difference between the action of the two Courts being, that the Supreme Court is restrained from issuing *execution*, but is required to send a "special mandate" to the Circuit Court for that purpose.

This latter provision, as to the execution, is conclusive on the construction that the statute intended the *judgment should be rendered by, and entered in, the Supreme Court.*

Having thus determined the proceedings on reversal of judgments and decrees of the Circuit Court, the 25th section provides for reversals of judgments of the highest courts of law or equity of a State, and declares that "*the proceeding upon the reversal shall be the same*" as on *reversal of a judgment of the Circuit Court.* (This section also contains an exception, hereafter to be referred to.)

Under these "regulations," it would seem to be plain, that when the judgment of a State Court is reversed, and all the matters in controversy judicially ascertained, this Court is not authorized to remand with instructions to enter up a

particular judgment, but must itself enter the judgment in its own Court.

In the case from 4 Wheat., 518, the action of the Trustees of Dartmouth College was trover for certain books and papers. A special verdict was found for $20,000, if it should be held that a certain act was not binding on the Trustees. Judgment was rendered for the defendant by the Superior Court of the State.

On writ of error, this judgment was reversed, and the following order entered: "And this Court, proceeding to render such judgment in the premises as the said Superior Court of Judicature ought to have rendered, it is considered by the Court now here, that the said Trustees do recover against the said Wm. Woodward, the sum of $20,000 and costs of suit; and it is further ordered, that a special mandate do go from this Court to said Superior Court, to carry this judgment into execution."

This entry is in exact conformity to the "regulations" prescribed by the statute as we construe it. The judgment is entered in this Court, but the execution is to issue from the Court below, as on reversals of judgments of the Circuit Courts. There is, however, one exception provided for in the 25th section. When the case had been "once remanded before," the Court is not only to enter up the judgment, but "award execution," as was done in the case of Martin *vs.* Hunter's Lessees, 1 Wheat., 304.

As this tribunal possessed coercive power over the Courts of the United States, it was unnecessary to confer upon it the authority to issue execution; but having no such power over the State Courts, the law provided it with the means of enforcing its judgments.

We then say that when the reversal is in favor of *either* the plaintiff or defendant in the original suit, and there is nothing uncertain to be decreed, and no damages to be assessed, so as to fall within the exception in the 24th sec-

tion, the statute requires that the judgment be entered in this Court, and that the entry in this case is not in conformity to law.

The exception in the 24th section, now to be considered, reserves cases "where the reversal is in *favor of the plaintiff in the original suit, and the damages to be assessed, or matter to be decreed are uncertain.*" In such cases it commands the Court "*to remand the cause for a final hearing.*"

The 25th section provides that the "proceedings on reversal shall be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may, at their discretion, if the cause shall have been once remanded before, prrceed to a final decision of the same, and award execution."

As this case was never "remanded before," and the reversal is in favor of the "plaintiff in the original suit," the statute, as we have seen, requires that the case should be "remanded for a final hearing." We submit that the direction by this Court to enter up a specific judgment, is not a remanding within the meaning of the statute. Such a direction is, in substance, the same as if the Court had itself entered the judgment. A compliance with this direction would not be the "final decision" of the Court below. That Court would decide nothing—it would act only as the register of the decision of this Court.

We maintain that the facts of this case bring it clearly within these statutory provisions which require that "when the damages to be assessed, or the matter to be decreed are uncertain," the case, on reversal, must be remanded to the Court below for a "final decision."

Referring to the practice in this Court where the reversal is in favor of "the plaintiff in the original suit," we find the following entries of judgment:

Weston applied to the Common Pleas for a prohibition to restrain the collection of a tax on the securities of the

United States. The Court granted it; but, on appeal, the constitutional Court reversed the judgment. On writ of error to this Court the tax was held to be unconstitutional, the judgment of the constitutional Court was reversed, and the cause remanded with directions "that such further proceedings be had as may consist with law and justice."—(2 Pet., 449.)

The trustees for Vincennes University filed their bill in chancery against the State of Indiana, claiming under grants certain public lands. The decree was against them. On appeal, the Supreme Court of the State dismissed their bill.

On writ of error this Court reversed the judgment, and the cause was remanded as above. (14 Howd., 271.)

Curran filed his bill in equity, in the Circuit Court for Pulaski county, against the State of Arkansas, to reach certain assets of the bank in satisfaction of his judgment. The bill was demurred to. The chancellor overruled the demurrer, and, the defendants electing to rest thereon, a decree was entered for complainant. On appeal to the Supreme Court of the State the demurrer was sustained, and the bill dismissed.

On writ of error to this Court, this judgment was reversed, and cause remanded as above.—(15 Howd., 322.)

The Jefferson Branch of the State Bank of Ohio brought trespass in the Common Pleas. Skelley, the defendant, justified as treasurer of Jefferson county in the collection of taxes. The plaintiff claimed an exemption under contract with the State. Judgment was given for plaintiff; but, on appeal to Supreme Court of the State, the judges, being of opinion there was no such contract, gave judgment for defendant, Skelley.

On writ of error, this judgment was reversed, and cause remanded as above.—(1 Black, 436.)

McGee filed his bill in the proper State Court, alleging

that his lands were exempt from taxes. The defendant justified as sheriff and tax collector. The case was carried to the Supreme Court, where the bill of the complainant was dismissed.

On writ of error, this Court held that the tax law violated the obligation of the contract made by the State, reversed the judgment, and remanded the case as above.—(4 Wall., 143.)

Under an act of New York the Board of Supervisors audited and allowed the claims of certain banks for taxes collected on National securities held by them. The Mayor, &c., refused to pay. A mandamus was sued out by the banks, and, on the answer, the Supreme Court gave judgment for defendants. On appeal to the Court of Appeals, this judgment was affirmed.

On writ of error, this Court reversed the judgment, and remanded the case as above —(7 Wall, 16.) See also (Bank *vs.* Supervisors, 7 Wall., 26)

If the facts of these cases made it proper to limit the judgment to a mere direction to proceed according to the principles contained in the opinion of the Court, we submit that the necessity for such limitation is made more palpable by the facts of the case now before us.

We think it due te the Court to say that, in our examination, we have found the following cases of reversal in favor of the plaintiff in the original suit where a special judgment has been directed to be made by the Court below:

Martin, devisee of Fairfax, vs. *Hunter's lessee*, 7 *Cr.*, 603.

This was an action of ejectment by the appellants, and judgment in favor of the defendant.

The question on which the case turned, was the construction of the treaty of 1794.

The mandate to the Court of Appeals directed judgment to be entered for the appellant, Martin.

Buell vs. *Vanness*, 8 *Wheat.*, 312.

Action in assumpsit by Buell, former collector, against his successor in office for share of forfeiture. There was a special verdict, on which there was judgment for defendant.

The question was as to the construction of the duty act of 1799, c. 128.

The mandate directed that judgment be entered for plaintiff on special verdict.

Dobbins vs. *Commissioner*, 16 *Pet.*, 435.

The appellant brought his action in the Common Pleas to try the right of the county to tax his pay. The Court gave judgment for the plaintiff. The Supreme Court reversed this, and entered judgment for defendant.

The question presented on an agreed statement was, Whether the plaintiff was liable to be rated and assessed for his office under the United States for county rates and levies?

The judgment of the Supreme Court was reversed, with directions to enter an affirmance of the judgment of the Common Pleas.

Calken vs. *Cocke*, 14 *Howd.*, 229.

The appellant brought his action in the District Court against the collector of Galveston for detaining his goods, and had judgment. The Supreme Court of Texas reversed this, and gave judgment for defendant.

The question was, Whether on the 30th January, 1846, the revenue laws of Texas were in force?

The judgment of the Supreme Court was reversed, with directions to affirm the judgment of the District Court.

Van Allen vs. *Assessors*, 3 *Wall.*, 588.

This was an action to recover taxes illegally collected. On a case stated, the Supreme Court of the State, and then the Court of Appeals, affirmed the authority of the Board of Assessors, and gave judgment for defendants.

The question was, whether the public securities held by Van Allen were exempt from taxation under the State law. The Court held they were, and reversed the judgment with directions to enter judgment for plaintiff in error. The same question and same entry in *Bradley* vs. *People*, 4 *Wall.*, 459

We submit these cases with the remark, that though they show a contrariety of practice, not easily reconcilable on principle, yet, in one and all, there were no questions, or defences, which were not clearly within the jurisdiction of the Court, and when these were decided by it, the whole case was disposed of, and nothing remained in the cause which had not been passed upon by the Court to which the writ of error was directed. They therefore afford no precedent for the case before us

But independently of this statutory regulation requiring the case to be remanded, we have the still higher requirement of the Constitution, which limits the appellate jurisdiction of the Court to cases "in law or equity arising under the Constitution, laws of the United States, and treaties made under their authority." The jurisdiction over State Courts is derived by implication from this grant, and the act, in describing it, very carefully declares, that "no error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the Record, and immediately respects the before mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute."

Hence, when a case is presented under the 25th section, the Court does not decide all the questions found in the Record, but those only thus specifically enumerated. In Matthews *vs.* Zane, Marshall, Chief Justice, says: "The plaintiff has stated several equitable circumstances in aid of the title given by his entry; but unless the entry be in itself valid, there can have been no misconstruction of an act of

Congress in dismissing the bill. And this Court cannot take into consideration any distinct equity arising out of the contracts and transactions of the parties, and creating a new and independent title."—(7 Wheat., 164.) Cases to this effect are numerous, and too familiar to be cited.

The sole question in this case which the Constitution authorized this Court to decide having been disposed of by the opinion, it is the duty of the Court to so frame its judgment that by no possibility should any question be concluded than the one they had passed on. It therefore follows, that if there were no requirement of statute law for remanding a case, still this would be, under the Constitution, the necessary result in all cases where there existed other questions than those of federal jurisdiction.

As, therefore, in this case the Record presents questions which have not been, and could not be, decided by this Court, we submit that the entry directed to be made is erroneous.

We are now to consider the effect of the act of 5th February, 1867, (14th Stat, 387,) and this renders necessary a more particular comparison of the 25th with the 24th section of the act of 1789.

By the 24th section, as already stated, when the judgment of the Circuit Court is reversed in favor of the original plaintiff, and the "damages to be assessed or matter to be decreed are uncertain," the case is to be remanded for "final decision," and in no case, on writ of error is this Court to issue an execution, but a special mandate for this purpose is to issue to the Circuit Court.

Having thus established the relation between this and the inferior courts of the United States, the 25th section provides for writs of error to State Courts in cases involving a federal question, and declares that "the writ of error shall have the same effect as if the judgment or decree complained of had been rendered in a Circuit Court, and the proceed-

ings, on reversal, shall be the same, except that the Supreme Court, instead of remanding the cause for a final decision, as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision, and *award execution*.

We submit that it could not have been the intention of the legislature to give authority to the Court to issue execution in any case where "the damages to be assessed, or matter to be decreed, are uncertain," even if the case "had been once remanded before;" for, to settle the question of damages in this Court, would necessitate the taking of evidence; and the passing of judgment thereon would be the exercise of original and not appellate jurisdiction.

Nor can it be supposed that while the Court was prohibited from passing a final judgment in such cases in reversing the judgment of Circuit Courts, that power was conferred on reversal of the judgments of the State Courts, as to which the jurisdiction is so carefully limited.

We conclude, then, that this authority to issue execution is confined to cases where the State Court has refused to carry out the judgment of the Court on some question distinctly made and decided within their jurisdiction, and where nothing remained uncertain or unascertained. In such a case, there being no means of coercion, the statute provides a remedy, and authorizes the execution to be issued from this Court.

The second section of the act of 1867 is a copy of the twenty-fifth section of the act of 1789 down to, and including, the words "and the proceedings on the reversal shall be the same." Then follows: "Except that the Supreme Court may, at their discretion, proceed to a final decision of the same and award execution, or remand the same to an inferior Court."

This differs only from the twenty-fifth section in the omission of the words "except that the Supreme Court

instead of remanding the cause for a final decision, as before provided," and also the words "if the cause shall have been once remanded before."

These omissions, then, do not change the action of the Court under the act of 1789 but in one particular, to wit: The prior act permitted execution to issue only when the case "had been once remanded before;" now, under the subsequent act, the Court has the discretion to issue the execution on its first judgment of reversal.

But this act in nowise enlarges the jurisdictional questions described in the twenty-fifth section. This had already covered the whole ground of constitutional authority; and when it says that the Court may, at its "discretion," proceed to a "final decision," or "remand" the cause, a legal discretion is conferred, which must be exercised according to the circumstances of each case. If there is nothing before the Court but a judgment on a Federal question, this Court may enter a final judgment, and award execution; but if, as in the case before us, there are damages to be determined, and other questions to be adjudged, over which this Court has no jurisdiction, no legal discretion can be exercised; for this would be a plain violation of justice as well as of the Constitution.

What the Supreme Court of the State would decree as to the rents and profits, and what as to the special defences of the answer, must be held to be "uncertain" until they have passed upon these questions.

We, therefore, respectfully submit that the entry which directs the affirmance of the decree of the Common Pleas, and thus deprives the Supreme Court of the right to decide these matters, should be reformed, and that the mandate should merely direct that further proceedings be had in conformity to the opinion of the Court.

P. PHILLIPS,
Of Counsel for Appellees.

WASHINGTON, 15*th Sept.*, 1869.

Supreme Court of the United States.

DECEMBER TERM, 1869.

JOHN MAGWIRE

vs.

MARY L. TYLER AND OTHERS.

ON MOTION TO MODIFY DECREE.

EWING & GLOVER,
For Magwire.

JUDD & DETWEILER, Printers, 517 Seventh street.

Supreme Court of the United States.

DECEMBER TERM, 1869.

JOHN MAGWIRE

vs.

MARY L. TYLER AND OTHERS.

ON MOTION TO MODIFY DECREE.

The defendants move that the decree "in the above cause be modified, and that so much as requires the supreme court of the State of Missouri to enter a judgment affirming the judgment of the court below be stricken out."

1st. *As to the power of this court to make the decree complained of.* The act of 1867, U. S. Statutes, vol. 14, pp. 386 and 387, directs that this court "may at their discretion proceed to a final decision of the same, and award execution or remand the same to an inferior court." The 24th section of the act of 1789 directs the circuit court, on reversing a judgment in the district court, to render such judgment as the district court should have rendered. And on error to the circuit court the supreme court shall do the same, except where the reversal is in favor of the plaintiff in the original suit, AND *the damages to be assessed are uncertain.* The fact that the judgment of reversal is in favor of the plaintiff in the original cause does not change the rule, unless ALSO "*the damages to be assessed are uncertain.*" There is no modifying element of the kind in this cause. Here the damages are already *assessed*; they are *certain* and *definite*; not even questioned of record. So that if this were a writ of

error to a circuit court, this court must render such decree as the circuit court ought to have rendered.

The 25th section provides for a writ of error to a State court, and that the proceedings on reversal shall also be the same, except that the Supreme Court may "proceed to final decision and award execution," even in cases where the damages to be assessed are *uncertain* if the cause should have been once remanded before. These two modifying elements, which balance and neutralize each other, are wanting in this cause; the cause was never remanded before, "and the damages to be assessed are" *not* "uncertain." This court, therefore, on the reversal of the decree of the supreme court of the State of Missouri, "*shall render*" precisely such decree as the circuit shall render on reversing the decree of the district court. In other words, this court "*shall*" render such decree as the State court *should have* rendered. If the supreme court of the State *should have* affirmed the decree of the common pleas, this court *must* affim it. Such is the act of 1789; under that act this court may not issue execution.

But under the act of 1867 (vol. 14, p. 387) this court *may at their discretion* "proceed to a final decision *and award execution*," "or remand the cause *to an inferior court*."

This is all there is of substance in the motion. Under the act of 1789, if that stood alone, the court should amend their order so as to affirm the decree of the court of common pleas of Missouri, to which we do not object, but under the act of 1867 this court *may, at their discretion*, affirm the decree of the court of common pleas, or order the supreme court of Missouri to affirm it. The order as it stands is right under the act of 1867.

While we maintain that the judgment is right under the act of 1867, we adopt the reasoning of the learned counsel as to the powers of this court under the act of 1789, pp. 6 and 7 of his brief, until he comes to this conclusion, p. 8:

"*As this case was never remanded before, and the reversal is in favor of the plaintiff in the original suit, the statute, as we have seen, requires that the case should be remanded for final hearing.*"

Here the conclusion forgets just one-half of the premises.

This court is required by the act of 1789 to enter such judgment as the court below ought to have entered, unless "*the reversal was in favor of the plaintiff in the original suit, and the damages to be assessed, or matter to be decreed* ARE *uncertain*." The AND, with the half of the sentence which follows it, patent as they are, seems to have escaped the notice of defendant's counsel. The order complained of is therefore within the jurisdiction of this court. It is also within its practice.

The case of *Martin* vs. *Hunter*, 1 Wheat., 304, was this: An action of ejectment was prosecuted in the district court of Virginia to judgment.

The court of appeals of Virginia reversed this judgment. On a writ of error this court reversed the judgment of the Virginia court of appeals, and sent a mandate to that court to carry out the judgment of this court, which could be done only by affirming the judgment of the district court of Virginia.

The court of appeals of Virginia disobeyed the mandate, and the cause came back again to this court.

Judge Story drew up the opinion in the case affirming the power to make the first order, and setting forth some of the reasons which had rendered proper and necessary a jurisdiction in this Supreme Court to enforce the laws of the United States, and not to be dependent even on the courts of last resort in a State for the execution of their judgments.

Judge Story said, substantially, that the Constitution presumed, whether rightly or wrongly he would not inquire, that "attachments," jealousies," "prejudices," and "interests" might exist in a State to obstruct or control the administration of justice.

And hence this jurisdiction had been created. Unless this court has the power to order State courts, from which causes are brought here to enter final judgments, and to prescribe the nature of such judgments, *or to enter such final judgments here*, it will be found that it has no power at all. It may only advise. It can conclude nothing.

Many cases have arisen in which the Supreme Court of the United States has exercised this salutory jurisdiction; as, Clark *vs.* Hardwood, 3 Dallas, 342; 6 Cranch, 267; Skillern's Ex'ors

vs. May's Ex'ors, 12 Peters, 339; ex parte Story, 14 Peters, 51; *West* vs. *Brashear*, 3 How., 618; *United States* vs. *Marvin*, 9 How., 34; *Walden* vs. *Bodley's* heirs.

If the court possesses the power to enter a final order, or to issue a mandate to the supreme court of Missouri, directing that court to make a final order, the only question that remains for consideration is, Was it proper and just, in the nature of this case to order the affirmance of the decree which was rendered by the court of common pleas?

Questions may arise on a record in this court which should be remitted to the State court for its determination; but they must be questions such as are worthy of consideration in a court of justice, not trifling and nugatory; and they must be questions of which this court cannot take jurisdiction; and this court must determine for themselves what questions, if any, arise upon the record which are proper for adjudication of the State court and *not proper for their own adjudication.*

Unless this court shall so determine for itself whether the case is one for final decision, no final decision can ever be reached here. It will always be in the *power of a litigant* to assert that there are questions of State law pertinent to the case upon which he desires the decision of the local courts, but here he shows none.

1. *As to the statute of limitations*, we contend there is no question of any bar by time in the record. The defendants say they rely on the statute of limitations; but that amounts to nothing. The shortest act of limitations in Missouri is ten years. This court says, in the opinion on file, that the plaintiff had no title to the land in dispute, and consequently no cause of action till his survey of May 26, 1862. Now, the present suit was commenced September 18, 1862.

Ought the court to remand the cause in order to have a trial in Missouri whether there was ten years between the 26th of May and the 18th of September, 1862? Or whether the United States should be barred by the possession of an intruder? A question proper for this court.

As to *bona fide* purchase, like the one just considered, it does

not rise to the dignity of a question. Counsel may call it a question; but no court, understanding the case, can so consider it. No purchaser could, in any stage of the proceedings, trace title back to the United States without tracing it through Brazeau—his petition, his concession, his conveyance, and his reservation; and the title, whence soever it may come, takes its effect under the laws of the United States and the acts of the officers under those laws. The answers to that objection, then, are briefly these: There can be no question on the subject at all fit for the consideration of a court; or, if any, it arises under the acts of Congress and of the officers of the United States under those laws. Besides, the defence is not pleaded so as to make or tender an issue, nor does it avail except in defence of a *legal title*, which the defendants have not.

To make out the defence of innocent purchase without notice, the purchase must be of an *apparent legal* title.

But Labaume had only an equity to his own land, and no title of any sort to the 4 x 4.

Shall the cause be remanded to try in the State court whether there has been a *bona fide* purchase from Labaume of this 4 x 4 arpents, when this court has decided that, according to the laws of the United States, Labaume never had any title at all thereto. Why, that would be retrying in the State court the correctness of the decision of this court. This court says, in the opinion on file, "Labaume never had any concession of that tract, (the 4 x 4,) never purchased it, and never had any title of any kind to any part of the concession except the 16 arpents as described in the deed from the rightful owner." Of course there could be no purchase from Labaume of it, innocent or otherwise.

2. *As to boundary.* Waiving the point that the boundary is settled by the acts of the officers of the United States, under an act of Congress, and therefore most strictly within the jurisdiction of this court, the point is frivolous and unworthy the consideration of a court of justice; it is as if I should sell all my house on A street except the northeast room, reserving that room, and the question of *boundary* should be raised whether my reservation

vs. May's Ex'ors, 12 Peters, 339; ex parte Story, 14 Peters, 51; *West* vs. *Brashear*, 3 How., 618; *United States* vs. *Marvin*, 9 How., 34; *Walden* vs. *Bodley's* heirs.

If the court possesses the power to enter a final order, or to issue a mandate to the supreme court of Missouri, directing that court to make a final order, the only question that remains for consideration is, Was it proper and just, in the nature of this case to order the affirmance of the decree which was rendered by the court of commun pleas?

Questions may arise on a record in this court which should be remitted to the State court for its determination; but they must be questions such as are worthy of consideration in a court of justice, not trifling and nugatory; and they must be questions of which this court cannot take jurisdiction; and this court must determine for themselves what questions, if any, arise upon the record which are proper for adjudication of the State court and *not proper for their own adjudication.*

Unless this court shall so determine for itself whether the case is one for final decision, no final decision can ever be reached here. It will always be in the *power of a litigant* to assert that there are questions of State law pertinent to the case upon which he desires the decision of the local courts, but here he shows none.

1. *As to the statute of limitations*, we contend there is no question of any bar by time in the record. The defendants say they rely on the statute of limitations; but that amounts to nothing. The shortest act of limitations in Missouri is ten years. This court says, in the opinion on file, that the plaintiff had no title to the land in dispute, and consequently no cause of action till his survey of May 26, 1862. Now, the present suit was commenced September 18, 1862.

Ought the court to remand the cause in order to have a trial in Missouri whether there was ten years between the 26th of May and the 18th of September, 1862? Or whether the United States should be barred by the possession of an intruder? A question proper for this court.

As to *bona fide* purchase, like the one just considered, it does

not rise to the dignity of a question. Counsel may call it a question; but no court, understanding the case, can so consider it. No purchaser could, in any stage of the proceedings, trace title back to the United States without tracing it through Brazeau—his petition, his concession, his conveyance, and his reservation; and the title, whence soever it may come, takes its effect under the laws of the United States and the acts of the officers under those laws. The answers to that objection, then, are briefly these: There can be no question on the subject at all fit for the consideration of a court; or, if any, it arises under the acts of Congress and of the officers of the United States under those laws. Besides, the defence is not pleaded so as to make or tender an issue, nor does it avail except in defence of a *legal title*, which the defendants have not.

To make out the defence of innocent purchase without notice, the purchase must be of an *apparent legal* title.

But Labaume had only an equity to his own land, and no title of any sort to the 4 x 4.

Shall the cause be remanded to try in the State court whether there has been a *bona fide* purchase from Labaume of this 4 x 4 arpents, when this court has decided that, according to the laws of the United States, Labaume never had any title at all thereto. Why, that would be retrying in the State court the correctness of the decision of this court. This court says, in the opinion on file, "Labaume never had any concession of that tract, (the 4 x 4,) never purchased it, and never had any title of any kind to any part of the concession except the 16 arpents as described in the deed from the rightful owner." Of course there could be no purchase from Labaume of it, innocent or otherwise.

2. *As to boundary.* Waiving the point that the boundary is settled by the acts of the officers of the United States, under an act of Congress, and therefore most strictly within the jurisdiction of this court, the point is frivolous and unworthy the consideration of a court of justice; it is as if I should sell all my house on A street except the northeast room, reserving that room, and the question of *boundary* should be raised whether my reservation

was *inside* the house or *outside*, in my neighbor's lot. This court would hardly send a cause to a State court to try that question.

But the laws of the United States, as has been repeatedly decided, declares that a confirmation without specific bounds attaches to no land; that is, has no boundary till finally surveyed by the United States. And when so surveyed it has the bounds mentioned in the survey, and can have no other; and no court whatever, Federal or State, can ascertain another boundary for it. Such was the condition of Brazeau's confirmation. It never had any boundary at all till surveyed in May, 1862. That survey fixed its legal *and only boundary*. The defendants in their answer raise no issue as to where that survey lies. They say it is precisely where we say it is; they say it is inside of Soulord's survey for Labaume. We say it is there the parties agree perfectly as to the place of that survey, and every corner and every line of it. Why then shall the cause be remanded in order to settle boundary? This court has decided that no court shall ascertain for Brazeau's confirmation any other boundary than the one defined by the survey of May 26, 1862. But the defendants ask the cause to be remanded in order to try in the State court whether the confirmation to Brazeau is not bounded and limited south of the ditch. That is, they would retry in the State court the correctness of the opinion of this court.

It is quite immaterial whether we call this a question of *title*, *location*, or *boundary*; it is *all*, *each*, and *either*. It is *title* under a *patent* issued in pursuance of a *confirmation*, *located* and *bounded* by a *survey* made by the surveyor general, pursuant to the order of the Secretary of the Interior, and this court has jurisdiction to determine on the validity of each and all of these, the *confirmation*, the *survey* which *locates it* and fixes *its boundary*, and the *patent* which passes *the title*, and has decided on them all.

We *deny* the position that "this court has no jurisdiction judicially to determine" these points, no matter how we designate them, whether they be principal or incidental.

Estoppel in pais.

There is no evidence in the case which warrants the raising of the question of estoppel. Suppose some one in whom the

inceptive title vested mistook the location, and claimed that it lay some where else, does that estop him from asserting his title when it is lawfully located, and he knows where it is? It does not even make a question that a court will consider, and the fact that trash like that is in the answer, does not make it a question. Suppose the defendants had specially set up the fact in their answer that they took possession of the property by force; burnt the plaintiff's steam mill, whipped and drove off his laborers, and kept him off the ground with an armed force, at great expense, and that therefore they had title by conquest, would this court send the cause down to the State court to pass upon the question, or would they treat it as frivolous or absurd, and utterly disregard it? The point here suggested is as good and as worthy of consideration as the alleged estoppel.

The estoppel is a rule of good faith. A party cannot be *estopped in pais*, except for fraud—fraudulent representation or concealment to the injury of the party claiming the estoppel. There is not in this cause a scintilla of evidence on which to rest the point. Indeed, this is the boundary question over again, or rather a dim shadow of that question. While the fixed law of this and all such cases is that the confirmee cannot locate his land, and no court whatever can locate it or bound it, and only a survey of the United States can attach it to the land to which it belongs, the defendants would persuade the court to remove the cause in order to have a state court decide that the party has located the land himself, and has admitted false boundaries. This is an undisguised effort to have the State court disregard the opinion rendered here. But when we notice that all the alleged admissions were prior to the survey, and the most of them prior to the confirmation, our wonder is excited that such a point is made with any confidence.

The exceptions to the master's report alone remain to be considered. Mr. Philips' argument may be stated thus: The plaintiff sued for the land in controversy, and rents and profits. He recovered the land and a larger sum for rents and profits than was fair on the testimony and law of the case.

The defendants saved their case touching the recovery of the

land, and also as to the unjust judgment for rents and profits, and took up the whole cause to the supreme court of Missouri; where they resisted the recovery not only of the land, but claimed also that the recovery of rents and profits was too large.

The supreme court of Missouri decided the plaintiff had no title to the land, and dismissed his suit. Now this court being of opinion that the plaintiff had a title to the land, gave him a decree for it, which was right enough, but improvidently affirmed the decree for rents and profits, *without giving the defendants the benefit of their appeal on that matter, which was very unjust.*

The learned counsel has proceeded on a mistake in regard to the facts, which are briefly as follows:

May 31, 1864, the interlocutory decree was entered in favor of plaintiff for the land. In that decree, Alexander Martin, Esq., was appointed commissioner of the court to take an account of rents and profits, and report with the evidence in relation thereto. (See Record, pp. 29 and 30.) The defendant's motion for a new trial and rehearing, filed after this decree was entered, may be seen. (Record, pp. 322 and 323.) On the foot of page 323 is their first bill of exceptions.

February 21, 1865, the final decree was entered. (See Record, p. 324.) This decree, after noting the appearance of the parties, proceeds thus: "The said parties submit to the court the defendant's exceptions to the report of the referee, filed herein, said report having been filed by Alexander Martin, Esq., heretofore appointed by the court as referee and commissioner, to take an account of the rents and profits of the premises in question held and possessed by defendants respectively, *whereupon the plaintiff in open court* voluntarily remits of the findings, assessments, and report of said referee and commissioner, the several sums assessed as follows:

* * * * * * * *

Then follows immediately (see Record, p. 325) the remitter of various sums, in all more than seven thousand dollars of rents and profits which had been allowed to plaintiff by the commissioner's report.

The decree then proceeds thus: "And the court, after the remitter made by the plaintiff of the sums and in the particulars aforesaid, overrules the said exceptions of defendants to the report." *To this overruling the defendants took no exceptions.* The final decree was then made, and defendants filed a motion for a rehearing and to set aside the final decree, which was overruled, and the defendants filed a second bill of exceptions. (Record, pp. 333–4.) But neither in said motion for rehearing, nor in said bill of exception, was any objection made to the amount of the final decree for rents and profits.

These facts indicate conclusively that all controversy over the "*master's report*" was sunk when the final decree was entered February 21, 1865. The record shows that, when the exceptions to the report were taken up, the plaintiff remitted a large amount—no doubt every cent which the defendants demanded. The exceptions are then overruled and the defendants are silent, taking no exceptions on *that*, but excepting to other matters.

In the absence of any evidence showing the motives of the parties, it is reasonable to suppose that the plaintiff was unwilling to risk a reversal of such a cause on a mere question of damages, and, therefore, gave the defendants the full benefit of their exceptions to the commissioner's report; and that the defendants did not further object to the residue of the rents and profits reported, because all they asked was conceded to them. Looking more closely at the record, it appears to be impossible that the defendants intended further to litigate the matter of rents and profits.

The very exceptions which they would have us believe they wished to insist upon before the supreme court of Missouri, *were never made part of the record;* and dropped out of sight from that moment. Not a particle of the evidence taken by the commissioner was preserved so the supreme court of Missouri could see it. Not even the commissioner's report was made part of any bill of exceptions, nor copied into the record for the supreme court of Missouri. Mr. Philips says "the supreme court of Missouri never reached the questions arising on the master's report and the exceptions thereto."

No. And it was never the intention of defendants that they

should. The defendants, after the 21st of February, 1865, abandoned all thoughts of the master's report, all their exceptions and all objections to the allowance for rents and profits. They stripped the record which they made upon their appeal to the supreme court of Missouri, of every scintilla of evidence and every possible means of looking into the question of rents and profits. Had the supreme court of Missouri affirmed the decree of the common pleas as to title, and desired to examine the correctness of the sum allowed for rents and profits, it would not have been done, and this on account of the defendants' own action.

It is manifest that the defendants were satisfied with the rulings of the court of common pleas on the question of rents and profits, and that they never intended to raise any question in relation thereto in the supreme court of Missouri.

That they have changed their minds since the decision here, is no ground for re-opening this matter.

The question of rents and profits rests where they left it, and where they were perfectly content to leave it. They might, with as much show of reason, ask to remove the cause, because on the trial in the common pleas they asked some question of a witness which the court ruled out, and which they deemed at the time not worth preserving in a bill of exception.

The history of this case and its present circumstances, suggest a consideration of some of Mr. Justice Story's remarks, in *Martin* vs. *Hunter*, 1 Wheat., p. 595. The defendants are very numerous, possess great wealth, and wield a large social and political power. Whether they hope to profit by that influence, if this cause be again returned to that court, we know not, but at any rate, unless the law require it, or the purposes of justice will be certainly thereby subserved, it ought not to be sent back.

If the court see fit to affirm the judgment of the St. Louis court of common pleas, pursuant to the provisions of the act of 1789, as in *Clark* vs. *Harwood*, 3 Dallas, 342, the mandate should go to the circuit court of St. Louis county, the successor of the common pleas.

EWING & GLOVER,
For Maguire.

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EWING & GLOVER,
For Maguire.

13 Peters 107.
21 Maine 136.
4 Watts & S. 323.

SUPPLEMENTAL BRIEF.

MAGWIRE *vs.* TYLER.

When unable to proceed last Friday, I left but little not answered in my brief on file; and of that, as to the statute of limitations—

1st. Mr. Phillips says, and cites a case to show, that when a patent issues conveying to A the legal title to land which belongs in *equity* to B, B may at once go into a court of equity and compel a transfer of the legal title. This is true, and Magwire's counsel thought the rule applied to his case *then*, and filed his bill in 1852, but he was mistaken. The United States could not be made codefendant with Labaume, and Brazeau had no title, legal or equitable, to any particular land which a court could recognize till surveyed and patented to him. Besides, this 4 by 4 arpents was never patented to Labaume, but was "*reserved*" for the person having the valid adverse right. So the United States "*reserved*" our right, and continued to be our trustee, until the trust was executed in 1862 by the issue of our patent. The statute had been running only five months when we filed this bill.

Prior to this time the record shows that the plaintiff pressed his claim at all times to the uttermost. After the burning of his mill and beating off his employees (pp. 223—230) he could not enter on the premises.

He protested against the action of Secretary Stewart. He filed his bill in 1851, which was prosecuted till 1862, when it was dismissed for want of survey and patent. He pressed his claim in the Department; got a survey and patent; and having placed his claim in a situation that our courts could take jurisdiction of it, he filed this bill.

A word more as to boundary.

When Chief Justice Taney and Mr. Justice Grier dissented as to jurisdiction in a former case, because it was not the province of this court to settle boundary, we had not yet brought the case within the acts of Congress and of the executive officers which govern it. We presented it as a case in equity under the general rules of law and equity. The *court* held that we made no case at all; the *dissenting judges*, that we made no case of which this court had jurisdiction.

2d. As to Estoppel.

The case from Maine which goes farthest, *a little farther than the law*, to sustain an estoppel in pais, if we admit it to be the settled law, would not justify the *raising of the question* under the facts in this case.

Choteau did not know where his sixteen arpents lay; he was a rich land holder; this was worth but a trifle in 1799, and it was Choteau's only, under a parol promise; such was the condition of things when he petitioned for an extended grant—Brazeau conveyed to him in 1816. In 1819 Choteau shows by his protest against the New Madrid claim, that he did not yet know where his sixteen arpents lay, but Labaume did. In November, 1817, Brown, at Labaume's request, surveyed for him the "*two tracts in one*," including Joseph "Brazeau's four arpents." (Record, p. 40.) In 1833 Chambers, representing Labaume, applied for a patent pursuant to Brown's survey, (Record, p. 90,) but was refused. "Said he had no objection to a re-survey; he only wanted his patent." He did not build a shanty or a fence amiss in consequence of Choteau's mistake. A. H. Evans, a surveyor, says (p. 101) "Christy's fence was north of Labaume's south ditch, and north of the north line of the four by four arpents, but can't say how far," and for his house and shanties (see plat, p. 310,) they are all well on his sixteen arpents.

3d.

In considering the question of jurisdiction in this case, counsel for the plaintiff did not deem it necessary to present an argu-

ment as to the extent of the powers of this court in cases of appeal from the State courts; but in response to the suggestion of His Honor Mr. Justice Miller, I submit briefly my views on that subject.

The Constitution, art. 3d, sec. 2d, declares "the judicial power shall extend to all cases in law and equity arising under this Constitution and the laws of the United States." From the generality of this language it is held clearly enough that in ordinary cases involving any of these several elements, this court may take jurisdiction, though it involve *also* other matters which, if they stood alone, are not within the jurisdiction.

The question then is, does the fact of the cause having been once in a State court, though containing elements which give this court jurisdiction, limit or embarrass this court in the performance of the jurisdiction conferred, or duties imposed on it generally under the constitution? To this, we answer, clearly not, except so far as restrained by acts of Congress.

The act of 1789, sec. 25th, contains this restriction and none else: "No other error shall be *assigned, or regarded as a ground of reversal,* in any case, as aforesaid, than such as appears on the face of the record and immediately respects the before-mentioned questions." Not that this court shall decide no other questions, if they arise incidentally in the investigation of the case, but, on the contrary, section 25, while it contains the restriction, provides, "that the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in the circuit court"—that is, as we think, it shall *bring up everything necessary for a full and final decision here,* the writ to a circuit court would do exactly that, and this court is not warranted in contradicting the statute and holding that this writ to the State court shall do less.

But, if there be doubt under the act of 1789, there is none under the act of 1867. It repeats, verbatim, the *power-conferring* language of the act of 1789, and the clause corelative to that in the act of 1789, which restricts the powers of this court to certain conditions, enlarges and extends those powers generally, subject only to the discretion of the court.

"The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceedings on reversal shall also be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the same, and award the execution, or remand the same to an inferior court."

These statutes do not, under any just construction, require this court to send any case of which it has jurisdiction, whether by appeal from the circuit court or from a State court, down to the one or the other for its opinion on questions incidental to the main issue.

T. Ewing,
For Maguire.

THE U. STATES PATENT OFFICE,

To all persons to whom these presents shall come, greeting:

This is to Certify, That the annexed is a true copy from the Secret Archives of the Office of the Caveat-filed by Byron Kensmore June 3, 1858, Reaping Machine

IN TESTIMONY WHEREOF, I, D. P. Holloway

Commissioner of Patents, have caused the Seal of the Patent Office to be hereunto affixed this twelfth day of November in the year of our Lord one thousand eight hundred and ~~fifty~~ Sixty three and of the Independence of the United States the eighty eighth

D. P. Holloway

In the matter of the
Petition of Lyon Tenure of Bedell, Laird
County State of New York.

Comptroller's Office.

Sir

I have the honor to acknowledge the
receipt of your communication of the 2nd inst. requesting
information in regard to the proper mode of proceeding
in order to obtain an order for the payment of interest on the sum
represented to be deposited in the Bank of Montreal. In reply
you are informed that the money deposited in the Bank may be withdrawn
upon the production of the Bank Book, and the order of the Bank Officer
appended to the proper receipt of the Treasurer is to be made
and presented to the Comptroller, it will be his duty to draw it on the Treasurer
of the United States, and he will comply with the requirements
of the said act.

Respectfully

of the operating shaft is sustained on an inclined track capable of adjustment both in elevation and in a longitudinal direction of the machine. By this arrangement I am enabled to accommodate the position of the rear to the size and condition of the grain to be reaped.

4th. I place on the side frame of my reaping machine an upright spring guide near the end from which the grain is raked, revolving (horizontally) and above the point in such a manner as to direct the grain slightly to the rear of the point at which it would fall if not directed in the manner contemplated in this my improvement.

Lyon Kilmore.

Witness to the above
Jan 14th 1870.

Johnson and Robbinson
Gentlemen.

Will you add the following Specification to the Specification you filed in the Patent Office for me in Prayer the first of June last for improvements in reaping machines.

Also attach to my reaping machine a rake which I claim to be my invention which takes the grain from the platform and leaves it in proper order to be bound without the trouble of

hand labor. (Which is done by means of belts (But ropes or chains may be used) in the platform on which the grain falls as it is cut.

These belts are placed parallel with the knife. Use three belts, the first one is placed about six inches from the edge of the knife, the second, sixteen inches, and the third twenty six inches, more belts can be used if necessary. These belts revolve on whirls placed at each end of the platform. The whirls at one end of the platform are all formed on one roller and so adjusted as to make the belts each revolve in the same time. The end of the platform where the grain falls off is made inclining at 45 degrees to the edge of the knife. The belt next to the knife is made the largest, the one farthest from it, the shortest. Place one cloth on each belt (two or more may be used) so placed as to all pass around the whirls at the end of the platform, so they commenced taking at the same time, so they all strike against the grain and commence moving at the same time. As the belt next the knife is the longest the cloth on that moves the fastest and when they have passed across the platform the bulls are headed and the grain is left lying at an angle of forty five degrees, so the three horse machine is moving. These belts are covered over by the platform except a place large enough for the cloth to pass through. These cloth when they pass under the whirls are drawn up to the side of the belts and return inside of the under lining of the platform so that they are not liable to catch in the stubble or ground. These belts are made to revolve in the same time and kept in their place so that the cloth in each belt stands in the right position in relation to the other cloth by means of leather cogs fastened upon the inside of the belts which mesh into cogs in the whirls. These belts are driven by a band from the ground wheel. A pair of bevil wheels are used in front of the finger piece to change the motion of the belts.

With much respect yours &c. — Byron Dinsmore.

Complainants Exhibit No 1

No 242. White & Ehal vs Kirby & al

Page 17.

No 1262.

Imp'd. Reaping Machine

D.M. Osborne and Auburn N.Y.

Wm A Kirby Assignees of Buffalo N.Y.

Byron Densmore Sweden N.Y.

Fig. I.

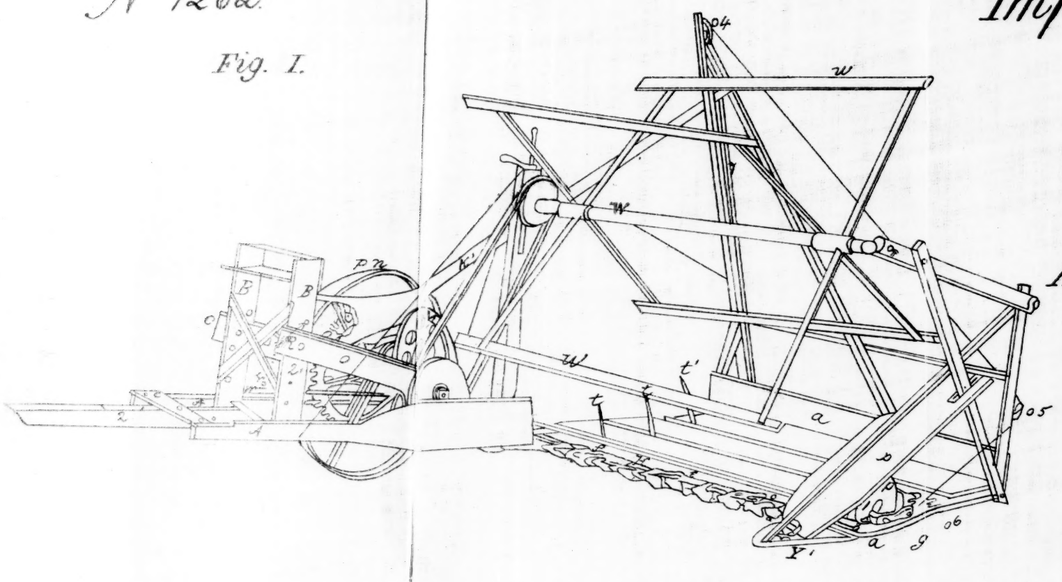


Fig. IV.

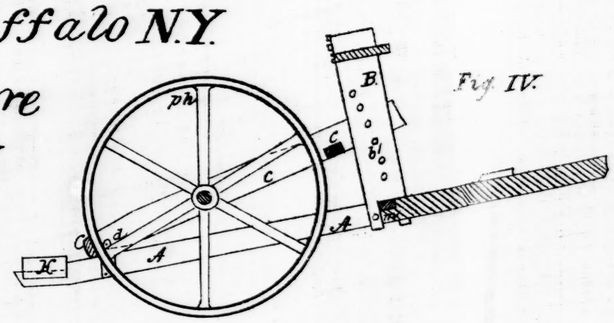


Fig. VI.

Fig. VII.

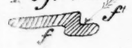


Fig. VIII.

Fig. V.

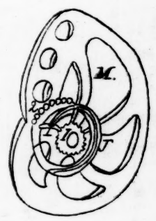


Fig. II.

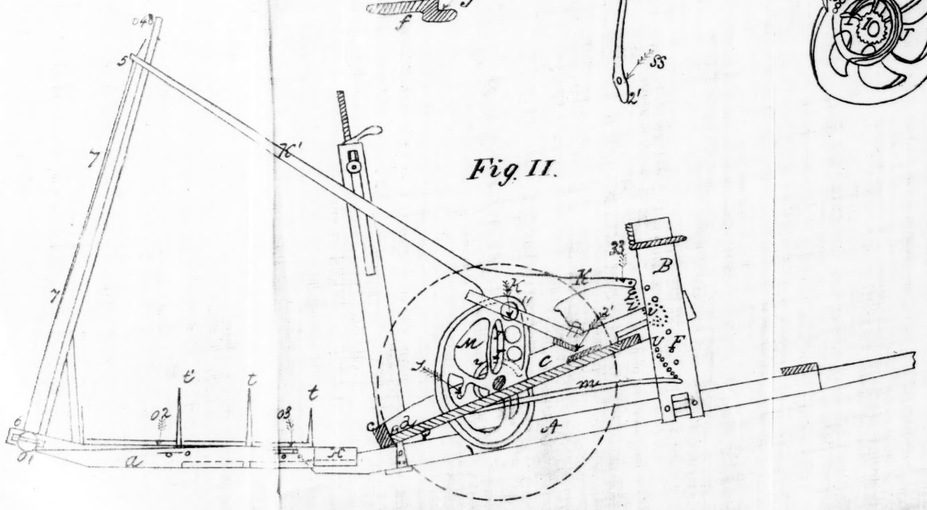


Fig. IX.

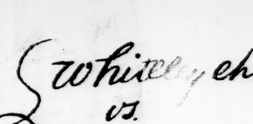
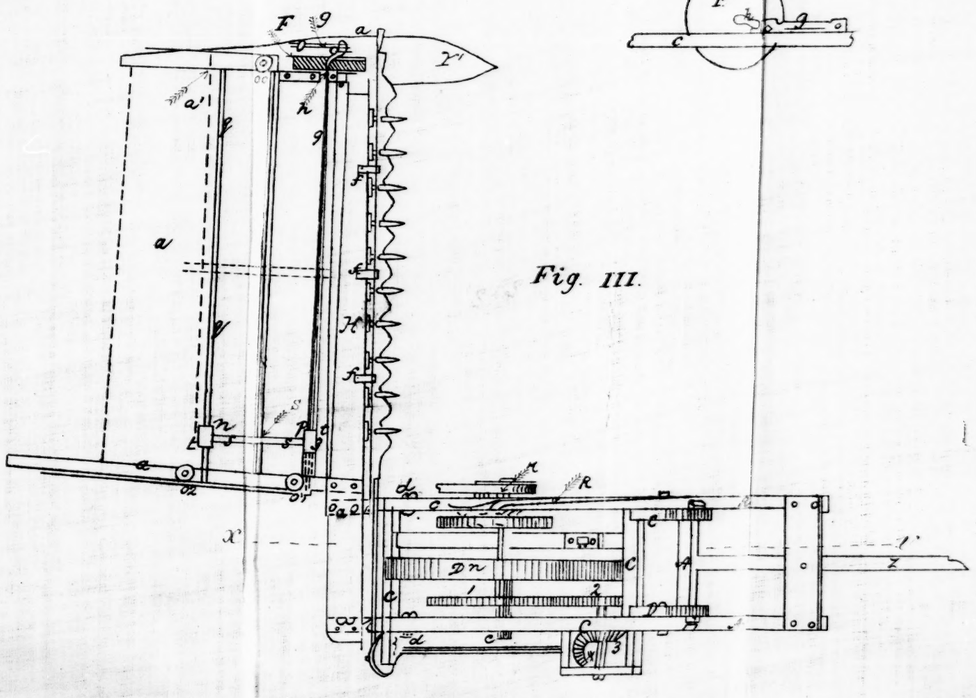


Fig. III.



Witnesses. D.M. Osborne for self } assignees
D.M. Osborne atty for W.A. Kirby } of Byron Densmore.

Correctly attached
S. Bosworth Act. Def. Pat. Office.

E.B. Forbush Pat. Atty. Buffalo N.Y.

W.H. Forbush, Del.

No. 242 { Whiteley dec'd / is / Kirby dec'd } Page 73.

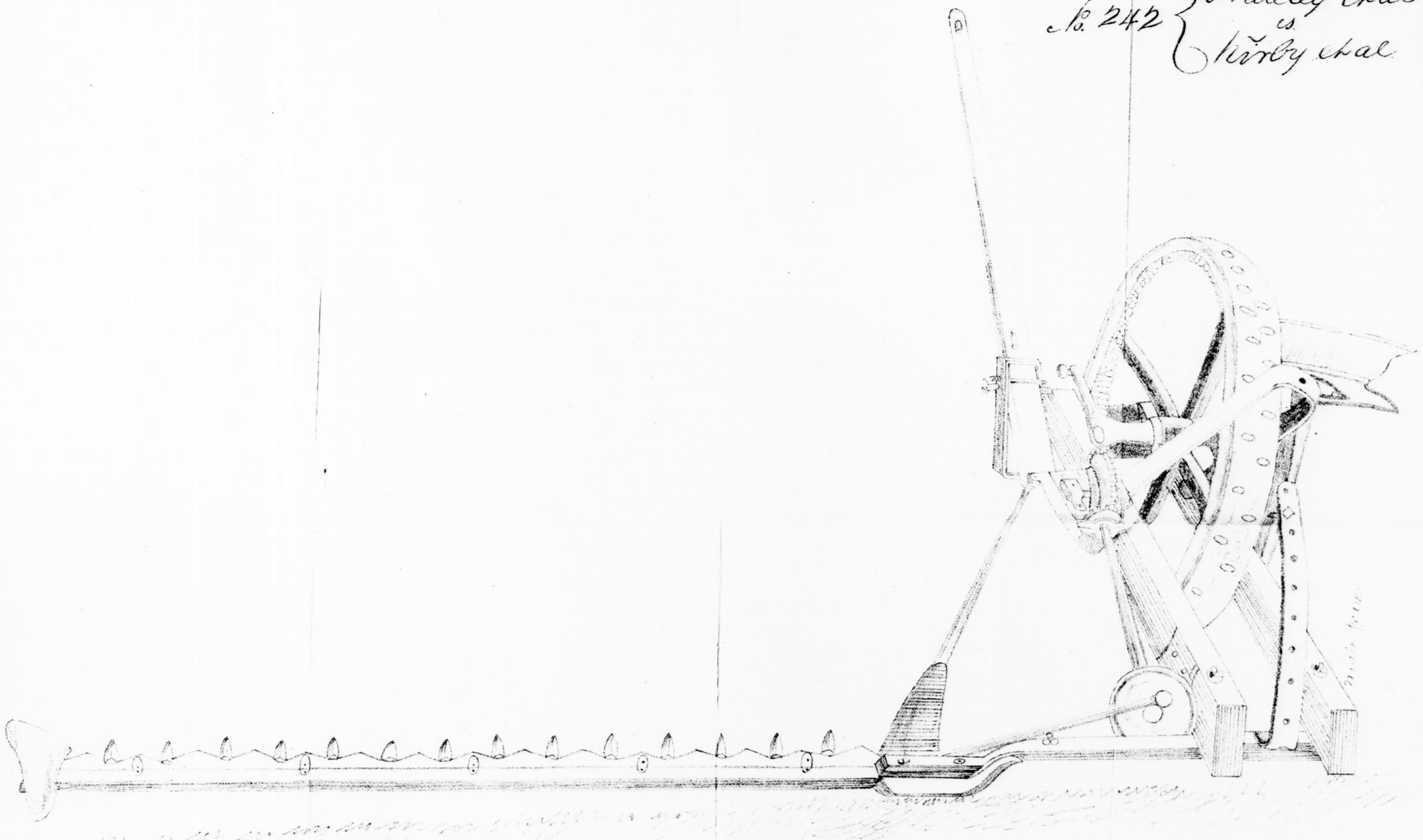


Exhibit "H".

No 8720.

Byron Densmore's Impt Reaper.

Patented Feby. 10th 1852.

No 242 { Whitley et al vs. Firby et al Page 117.

Fig. 1.

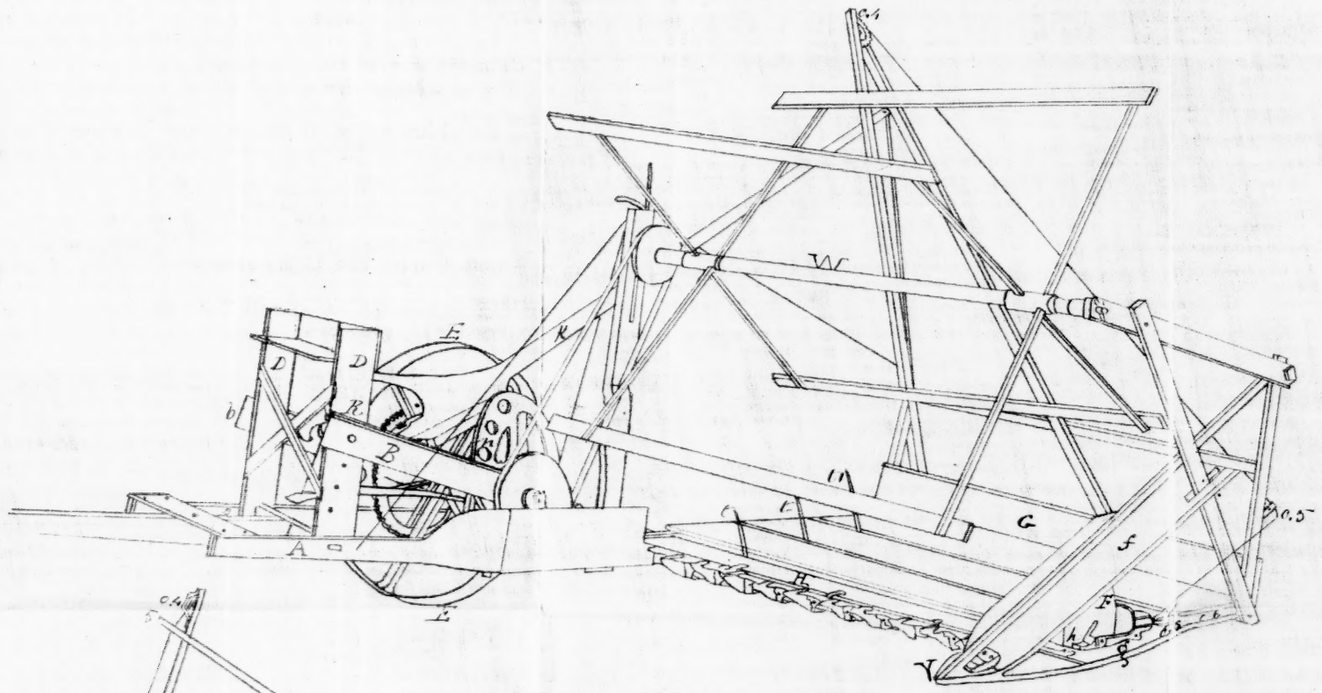


Fig. 2.

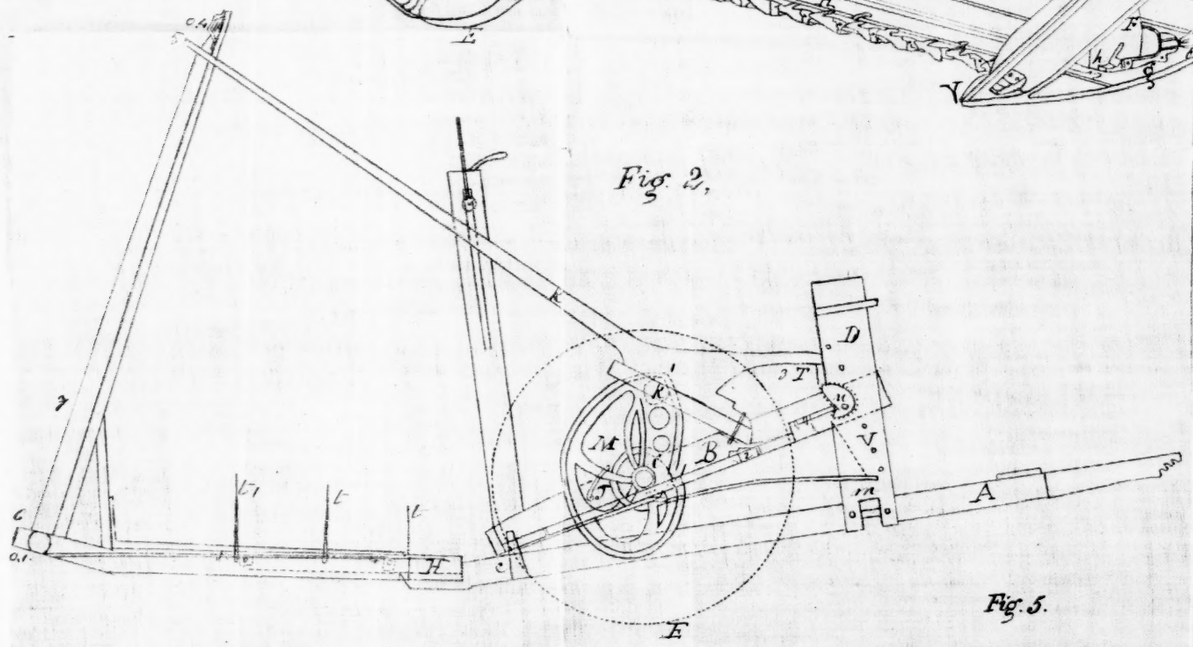


Fig. 5.

Fig. 3.

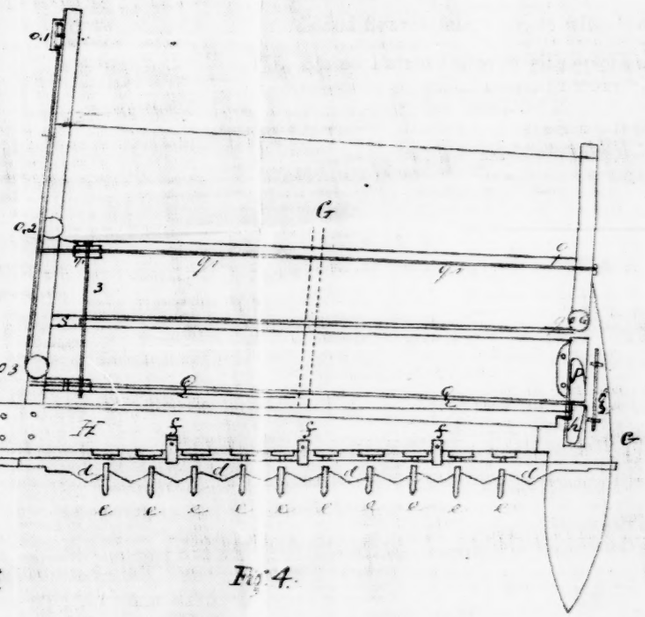


Fig 6.

Fig 4.

No 3242 Whiteley et al
Kirby et al
Page 137
(2)

fig: 5.

fig: 6.

fig: 2.

fig: 3.

Nelson Platt's Harvesting Machine.

Patented

No.

Fig. 1.

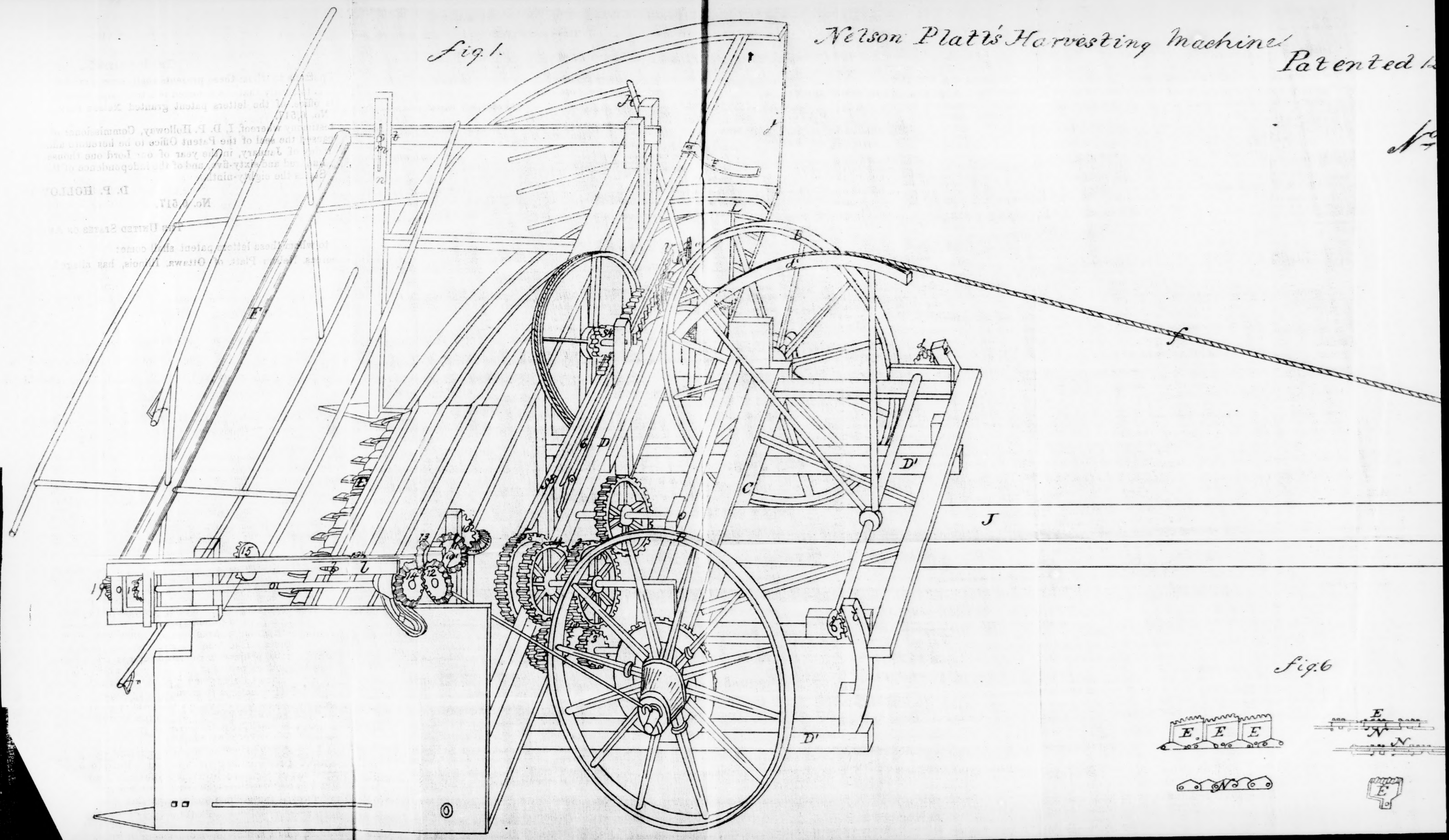


Fig. 6

fig 1.

Nelson Platt's Harvesting Machine

Patented 12th June 1849.

No 242 { Whiteley et ae / Kirby et ae

Dwg 137 (1.)

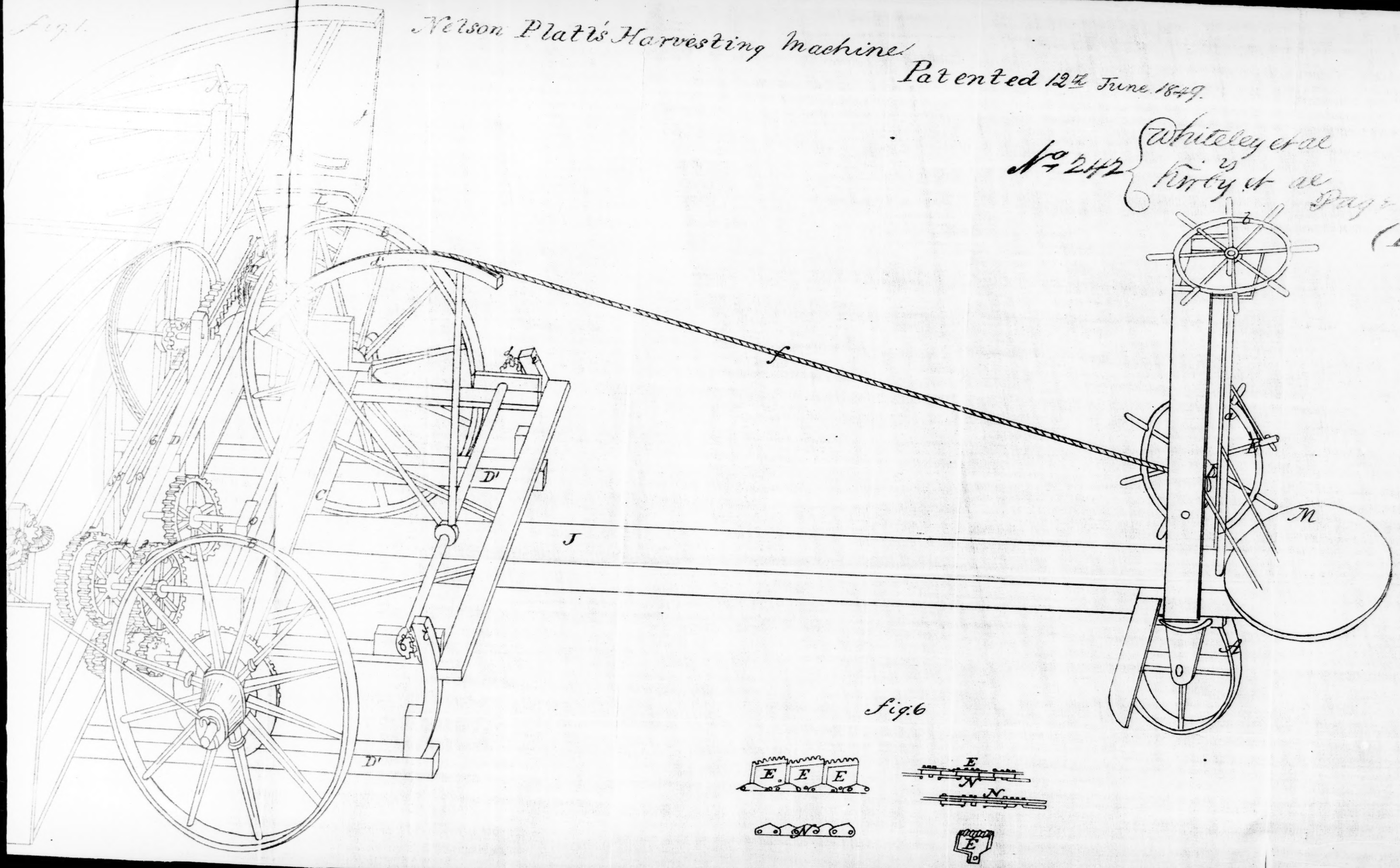


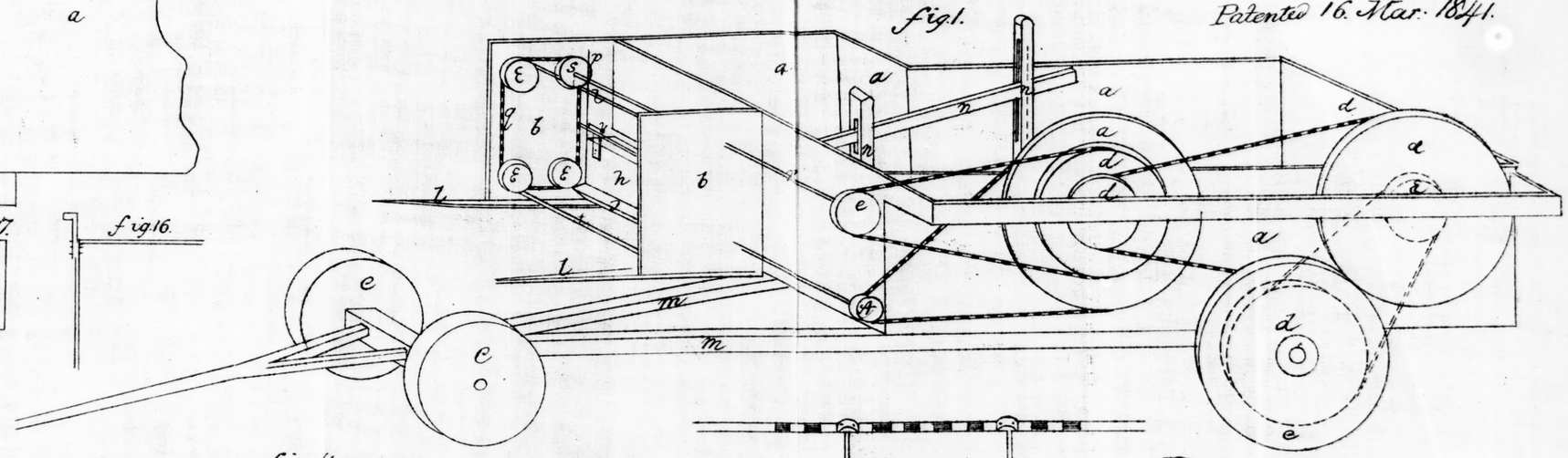
fig 6

A. Churchill's Harvesting Machine

№ 242 Whiteley et al vs. Kirby et al Page 149

Patented 16 Mar. 1841.

fig. 1.



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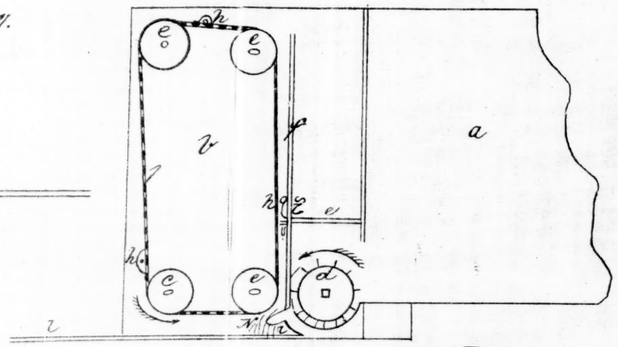

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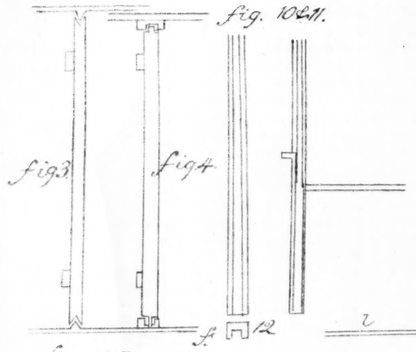


fig. 3 fig. 4

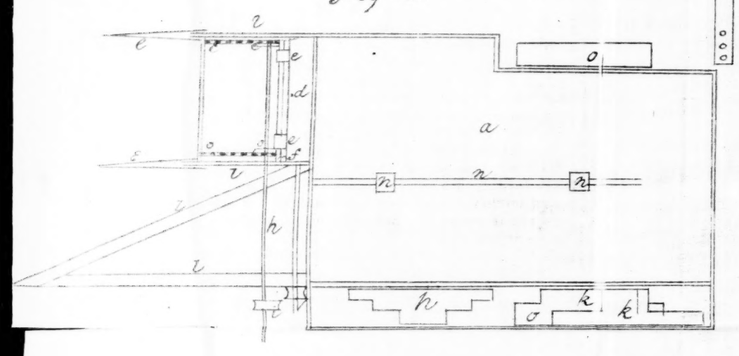
f. 12

f. 15.

f. 18 & 17.

fig. 16.

fig. 5.



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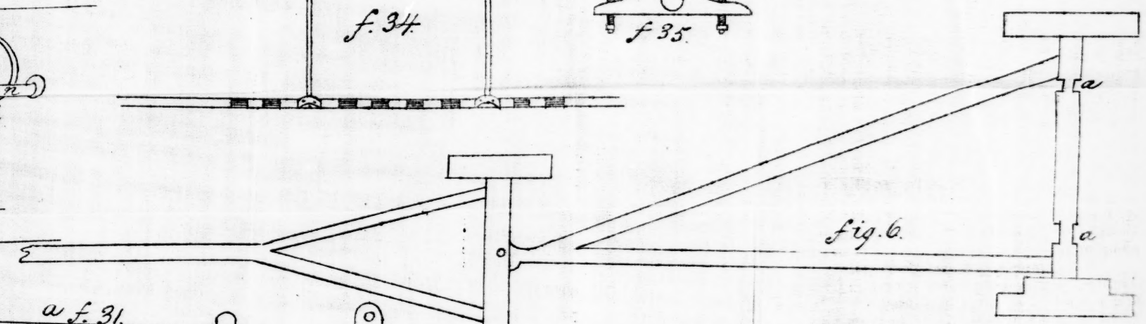
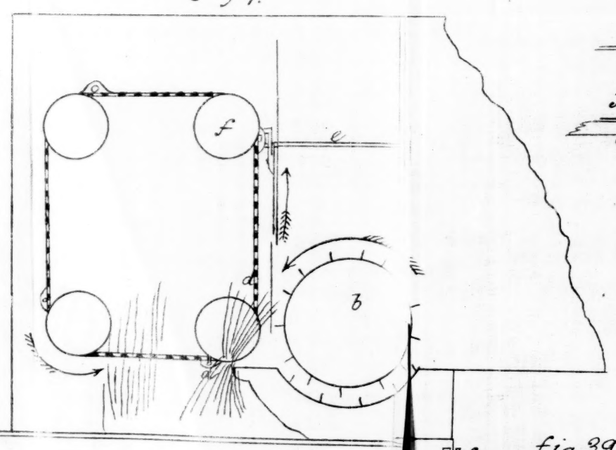


f. 34

f. 35

fig. 7.



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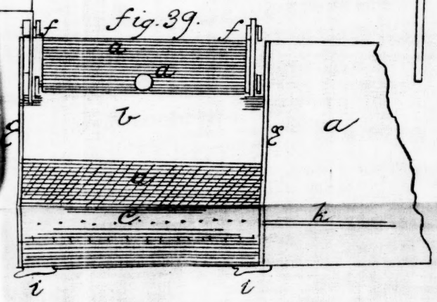
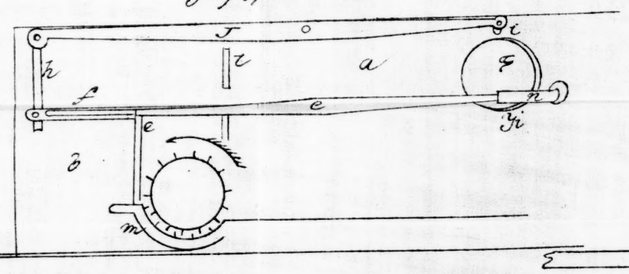


fig. 4.



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f. 33.

f. 30.

f. 19.

4 20

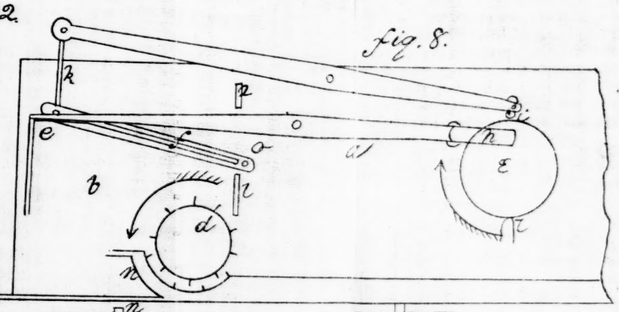
a f. 31.

f. 37

f. 31

f. 32.

fig. 8.



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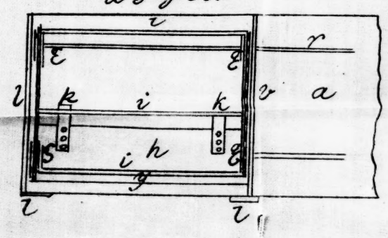

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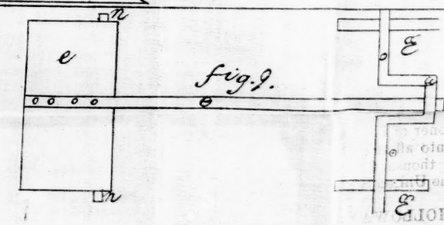


№ 242 Whiteley et al vs Kirby et al Page 161.

Edwin P. Cavetts
Impt in Reaping Machines.

Fig. 1

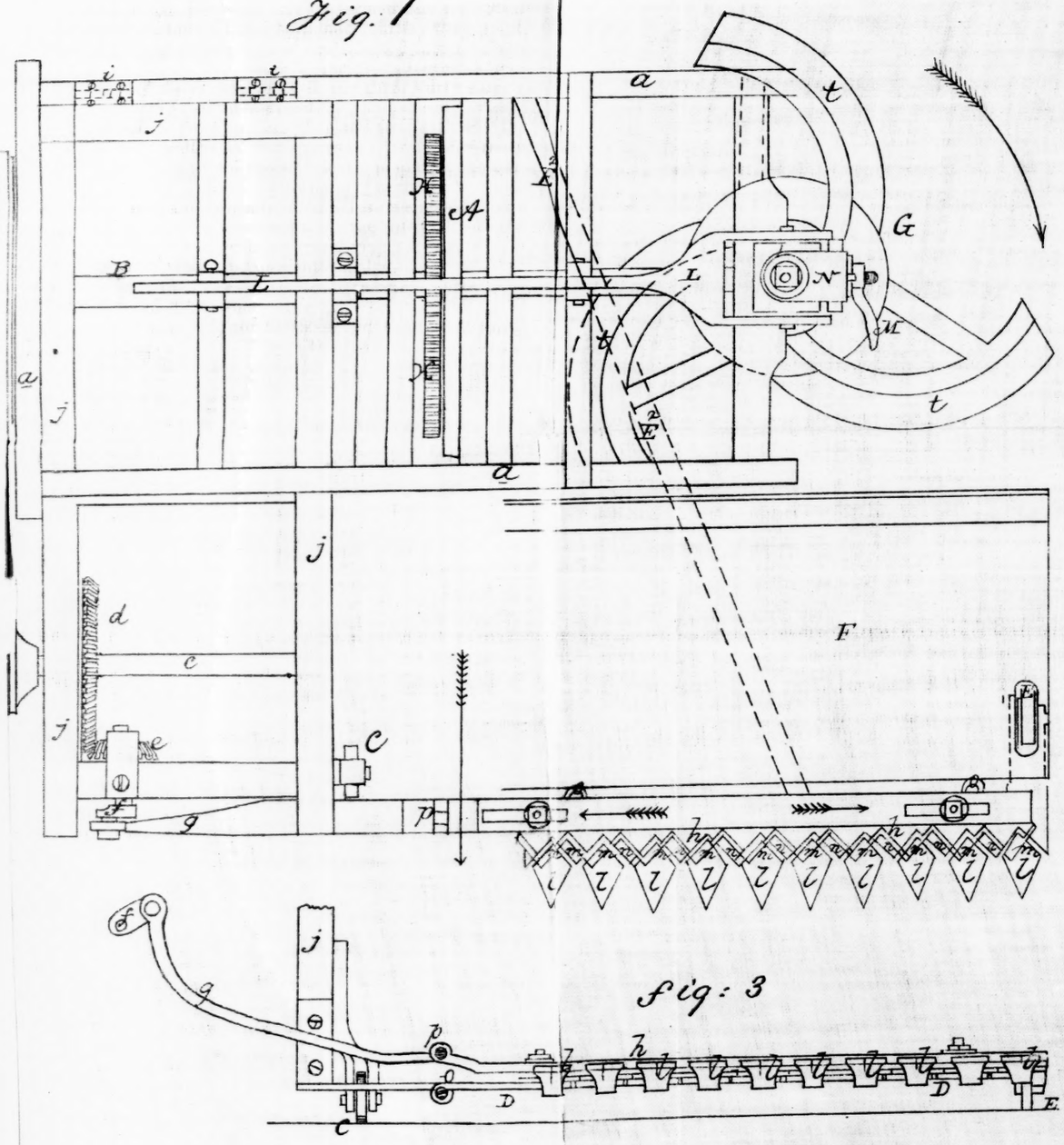
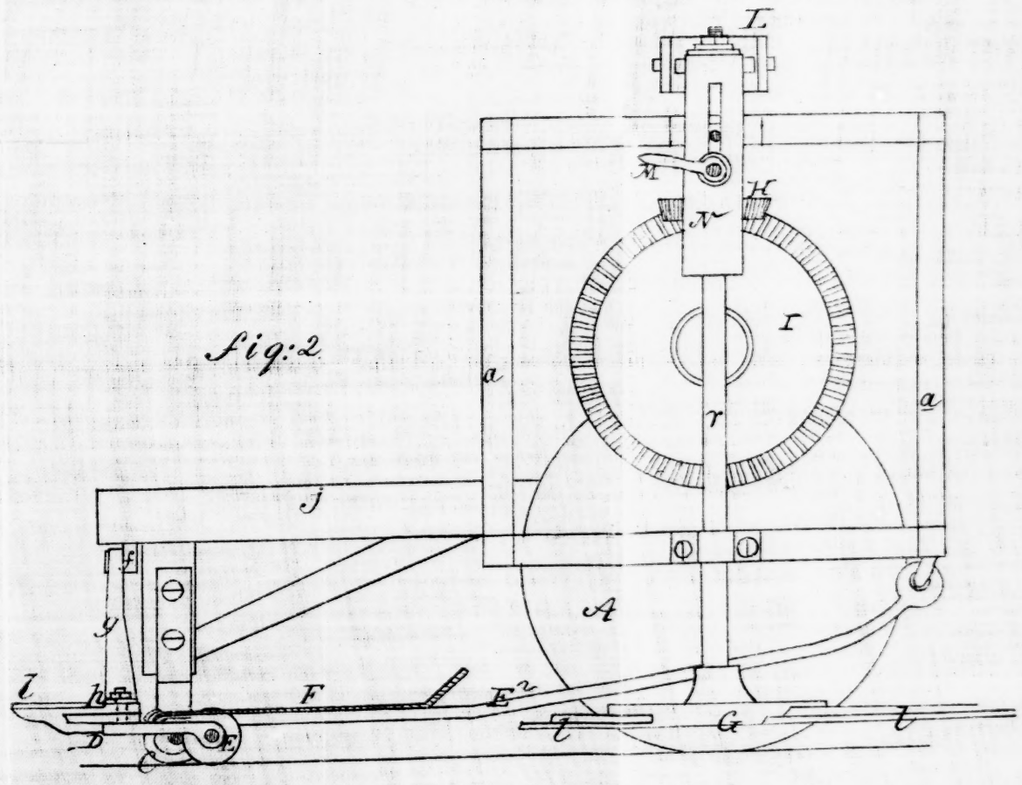


fig: 3

fig: 2



№ 985.

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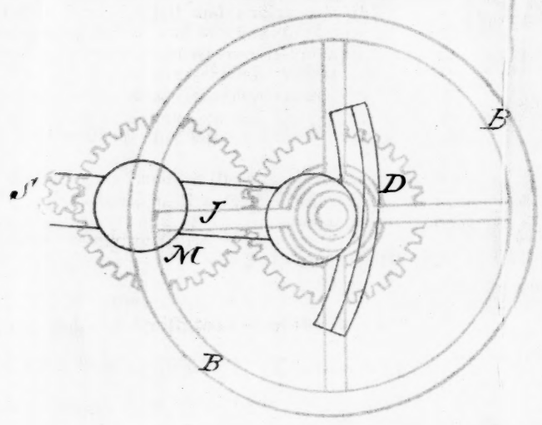

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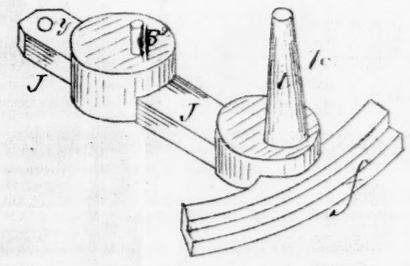
Kinby

T. S. Steadman's.

Winchester
Sol. F. Kau
Emanuel Ru

Improvement in Harvesters.

Figure: 4.



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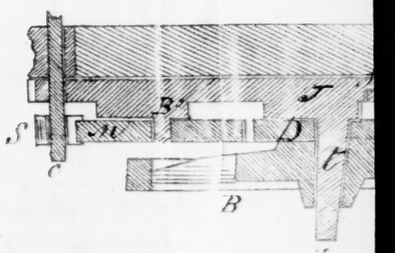

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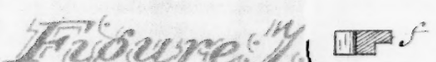

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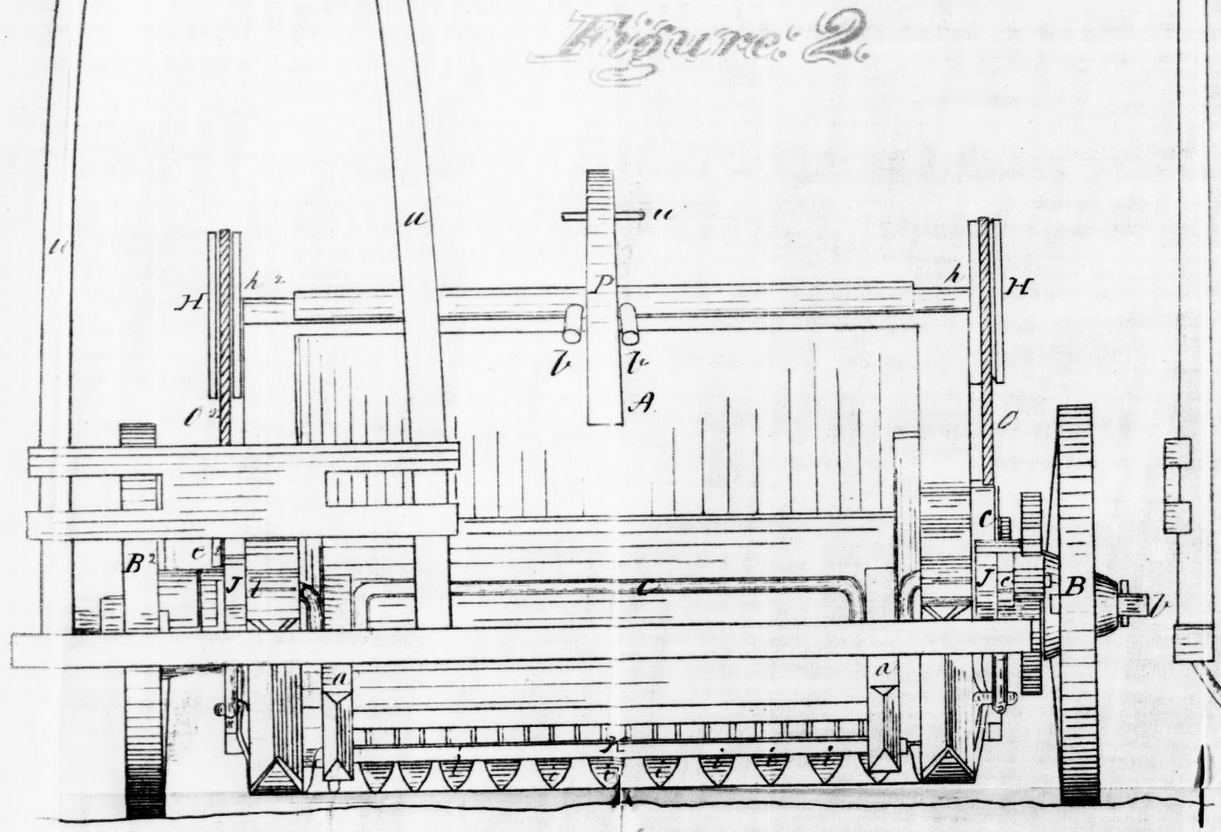

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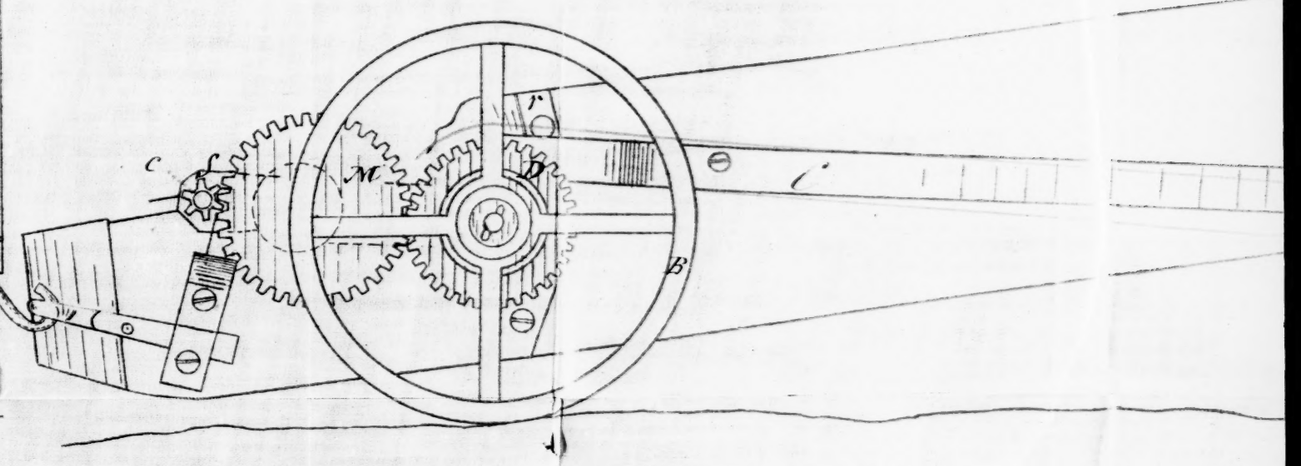


Note. The thills u, u, drawn on the wrong side of the machine.

Specification and Drawings Prepared at the Office of J. W. M.

No 242 { Whiteley et al / Kirby et al } Reg. 1865.

Application A

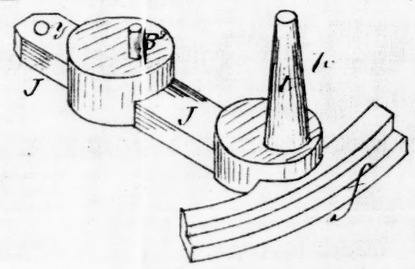
T. S. Steadman's.

Whitesmith
Sol. F. Houck
Emanuel Riegel

N. M. Whitely Jr.

Improvement in Harvesters.

Figure 4.



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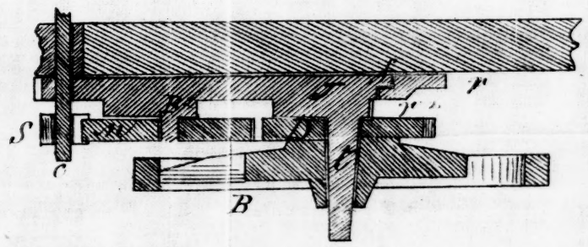
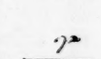


Figure 5.

Figure 7.

Figure 8.



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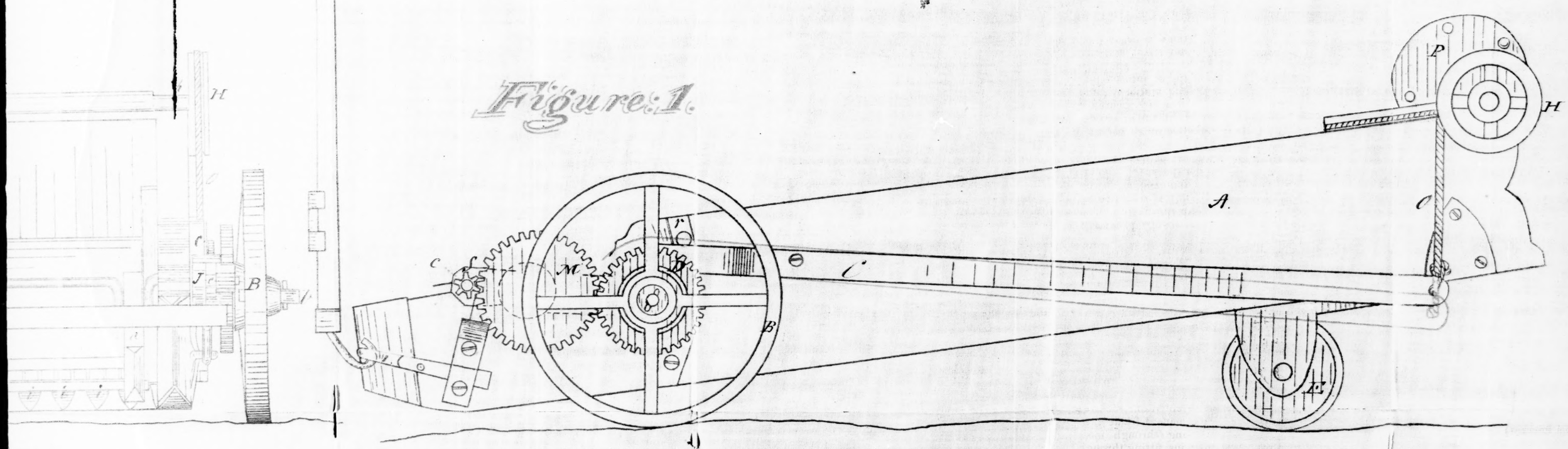


Specification and Drawings Prepared at the Office of J. N. McIntire, Washington D.C.

Division of Reissue.

No 242 { W
L

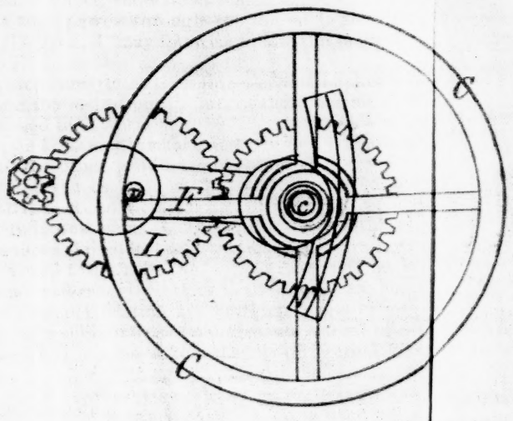
No 986.

T. S. Steadman's.

Witnesses
Sol. F.
Emanuel

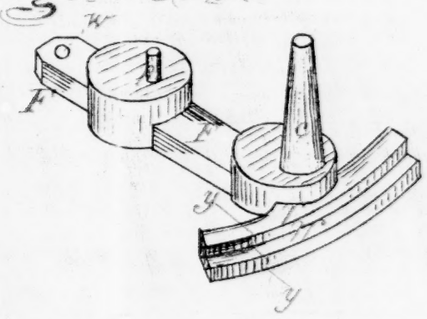
Improvement in Harvesters.

Figure: 6.

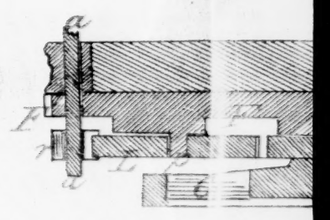


Witnesses.

Figure: 4.



Figure



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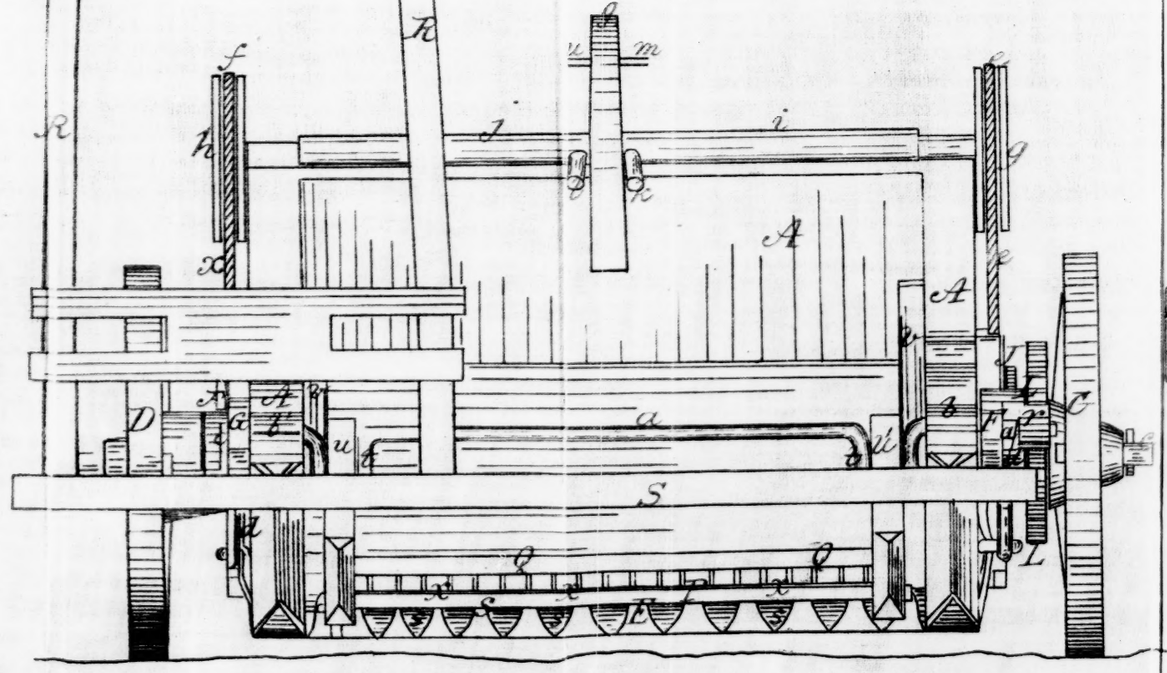
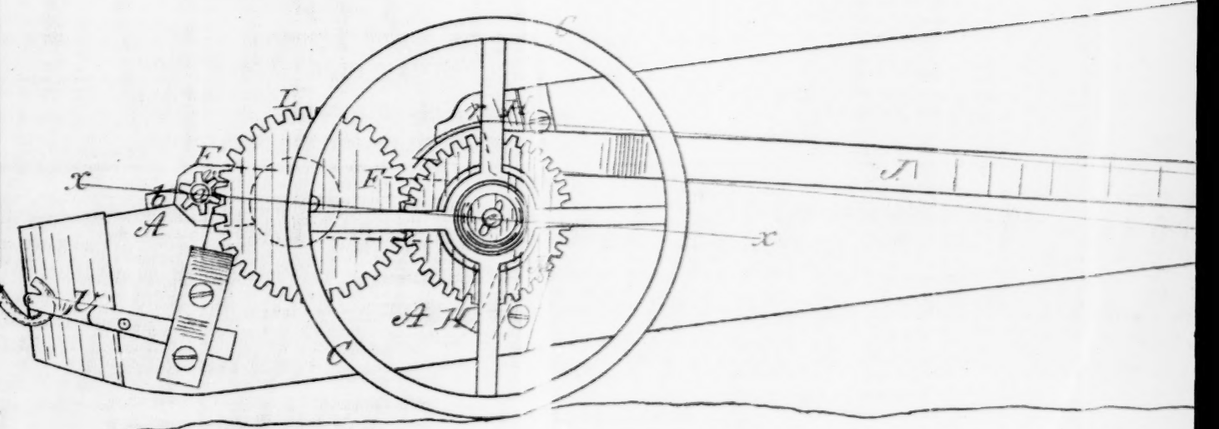


Figure: 3.

Figure: 1.



Note. The thills "R" drawn on the wrong side of the machine ——— correctly attached

Specification and Drawings Prepared at the Office of J.N.W.

Arthur L. McEntire Dft. P Off.

Division of Reissues.

No. 242 { Whiteley et al / Kirby et al } Reg. 170 Application B.

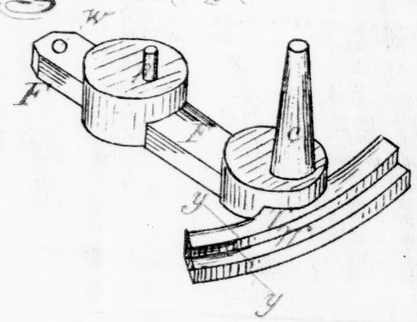
T. S. Steadman's.

Improvement in Harvesters.

Witnesseth
Sol. F. Kouck
Emanuel Riegel

Wm. Whiteley Jr.

Figure: 4.



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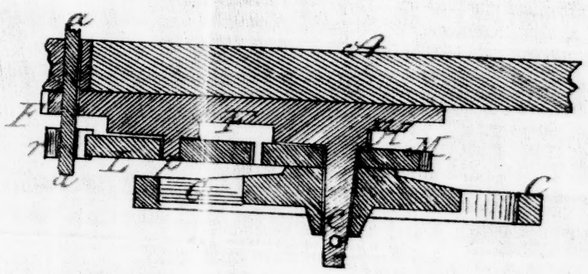

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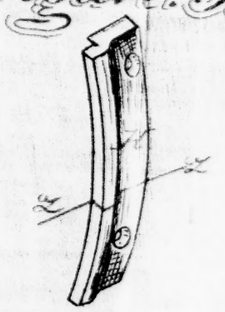
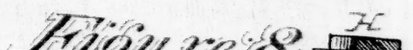


Figure: 7.

Figure: 8.



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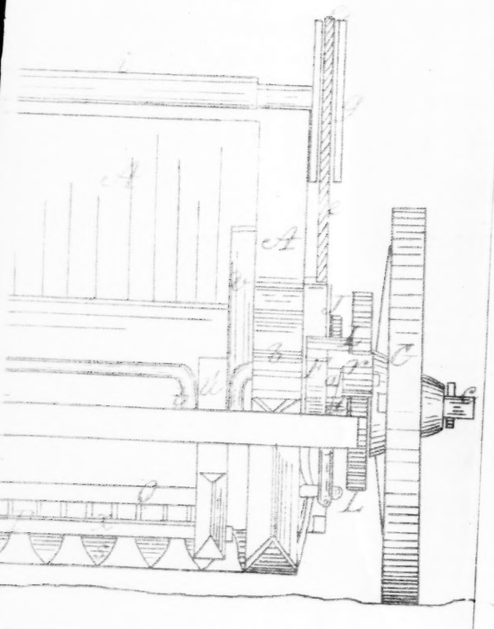

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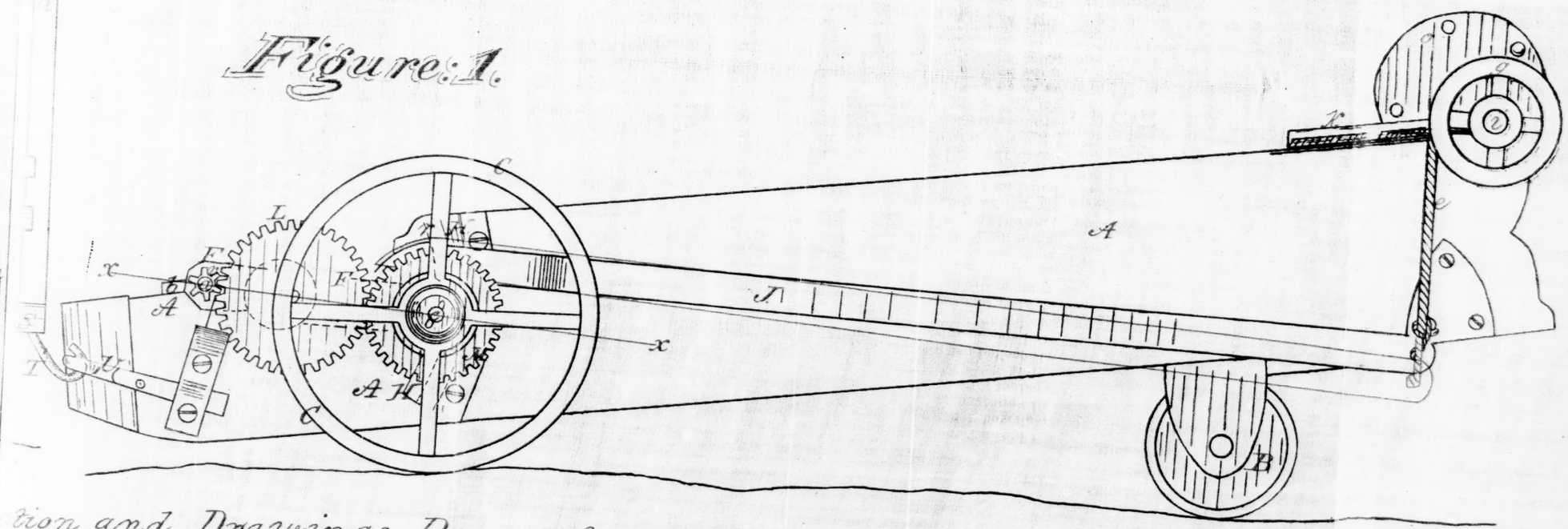


correctly attached Specification and Drawings Prepared at the Office of J. N. McIntire, Washington D.C.
McIntire Sy. P Off.

№ 2463 { Whiteley / Swayne } Page 32.

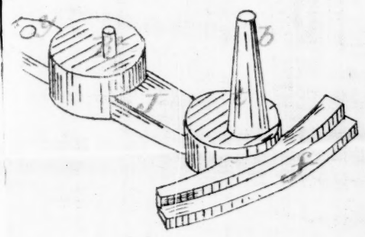
Application A.

T. S. Steadman's

Improvement in Harvesters.

{ W. Knefpneth / Sol. J. Houck / Emanuel Riegel } Wm. Whitely Jr.

Figure 4.



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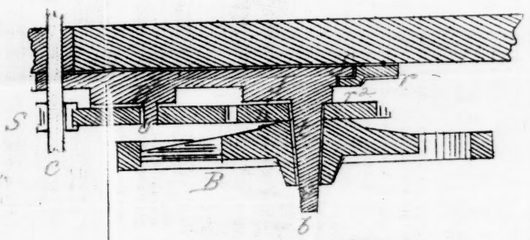
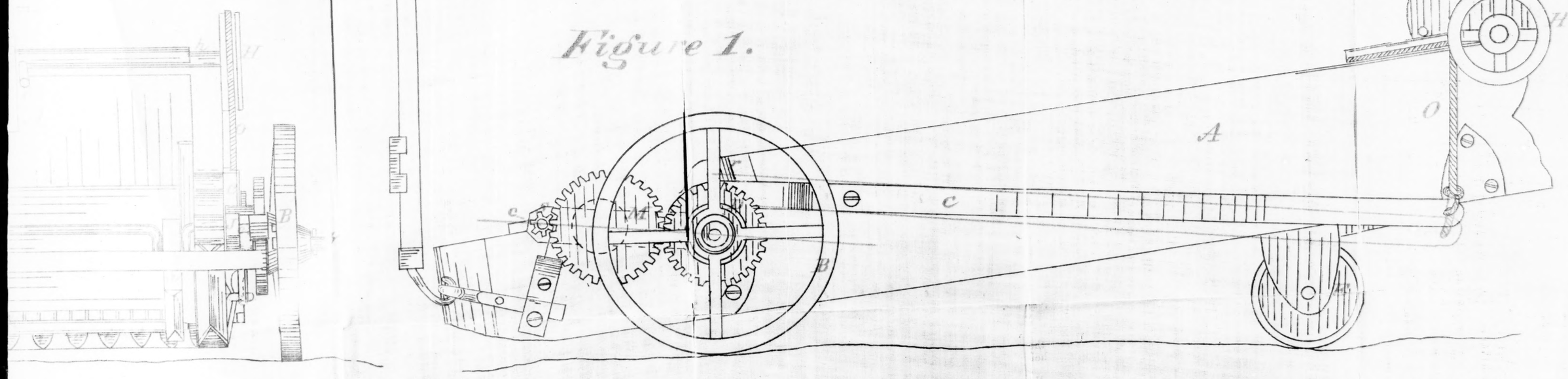


Figure 5.

Figure 7.

Figure 8.

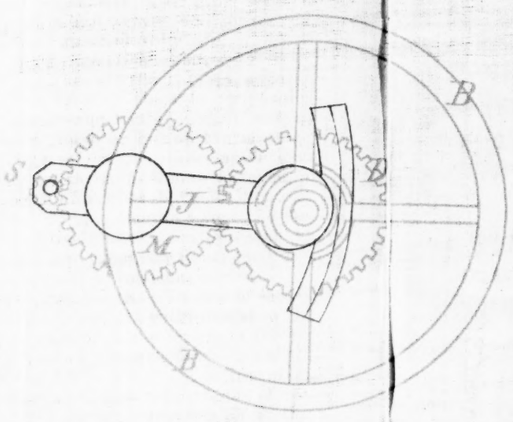
Figure 1.



Specification and Drawings Prepared at the Office of J. N. McIntire. Washington. D.C.

№ 985.

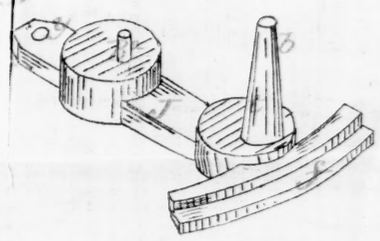
Figure 6.



T. S. Steadman's

Improvement in Harvesters.

Figure 4.



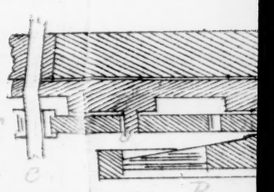


Figure 7.

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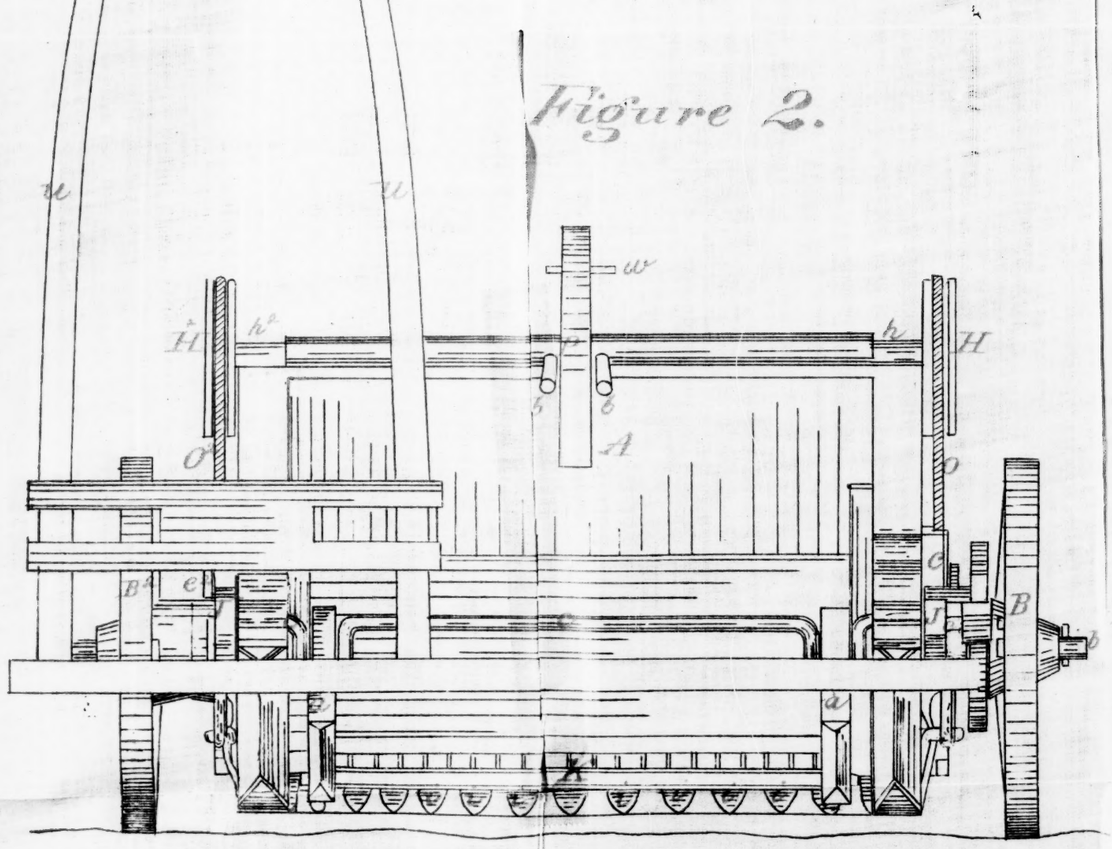
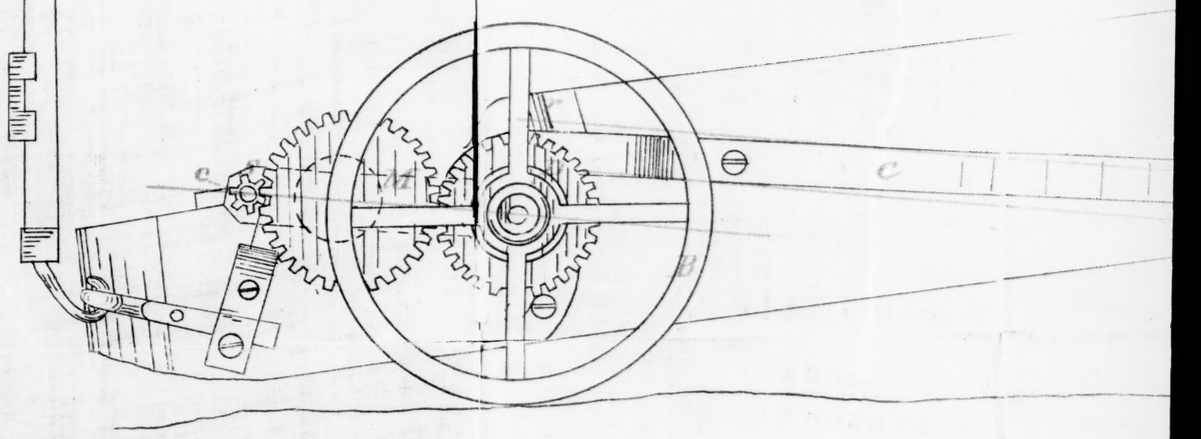


Figure 1.



Note. The thills "u u" drawn on the wrong side of the machine

Specification and Drawings Prepared at the Office of [illegible]

№ 24[illegible]

Witnesses
Sol. J. [illegible]
Emanuel [illegible]

Division of Reissue

№ 2463 { Whiteley & Swayne } Page 37.

Application B.

T. S. Steadman's.

Improvement in Harvesters.

{ Witnesseth: Sol. J. Houck, Emanuel Riegel } { W. M. Whitely Jr.

Figure 4.

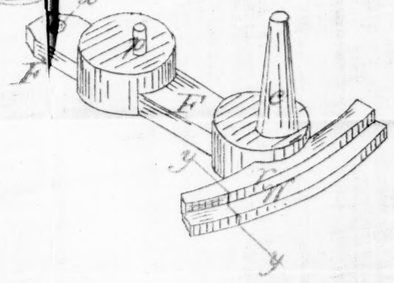
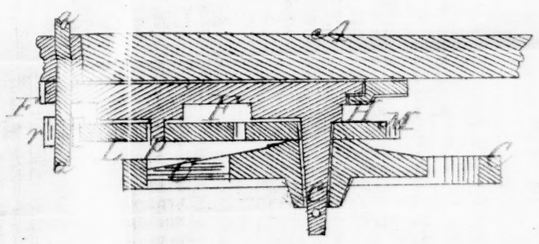


Figure 3.



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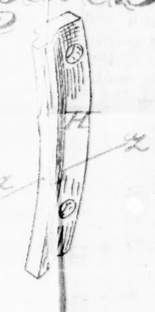

Figure 7.

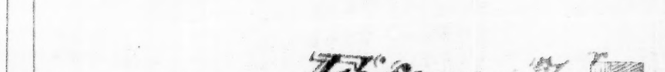

Figure 8.

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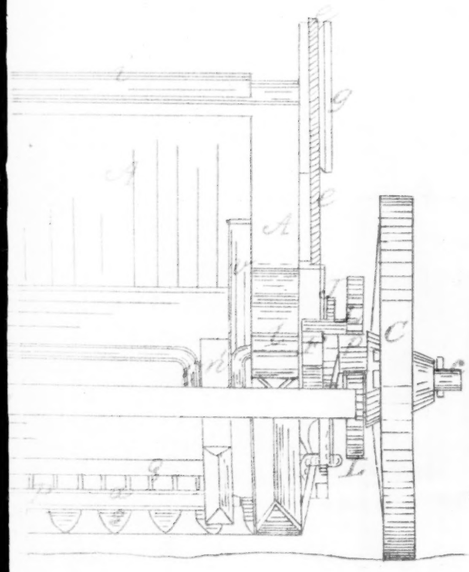
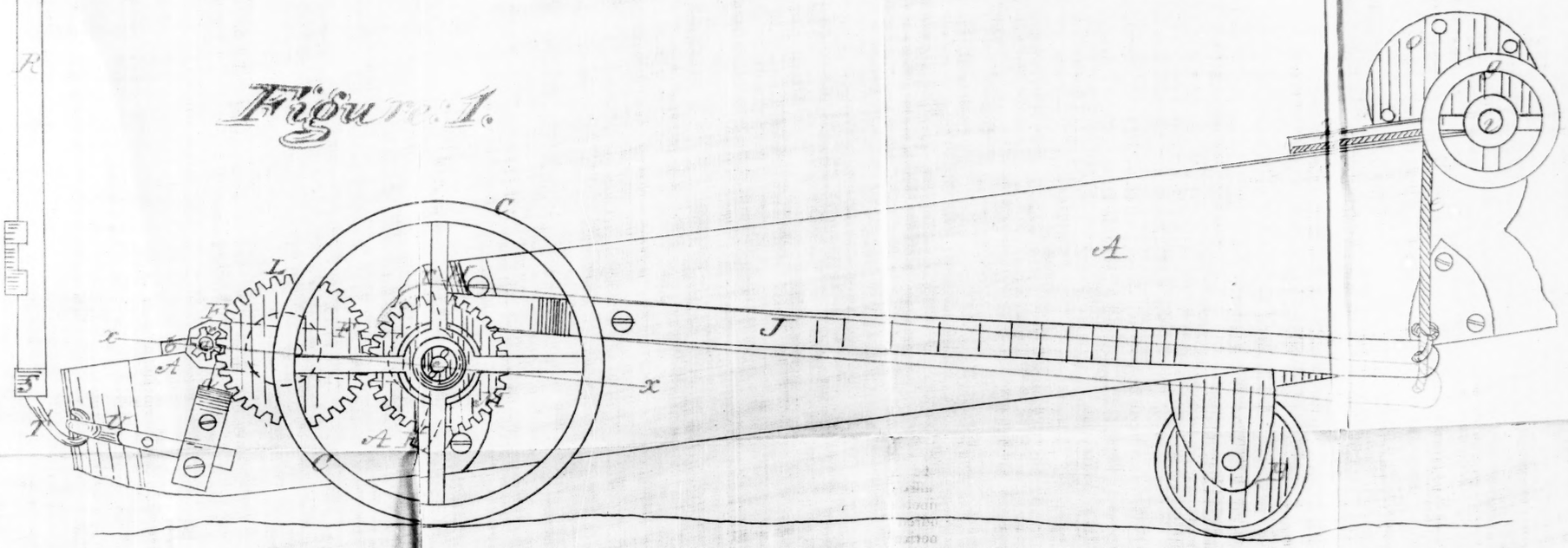


Figure 1.



Specification and Drawings Prepared at the Office of J. N. & M. McIntire. Washington D.C.

rrectly attached.
M. McIntire Dep. P. Offs.

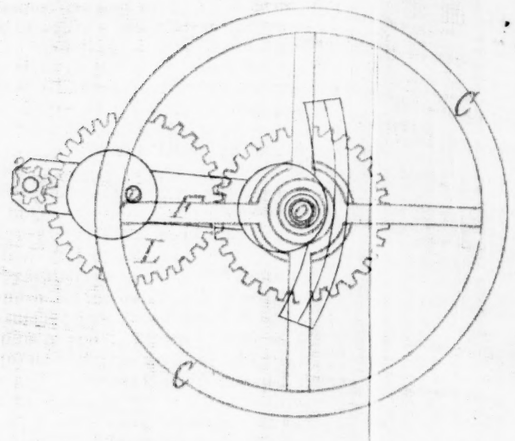
Division of Reissue

No. 985.

T. S. Steadman's.

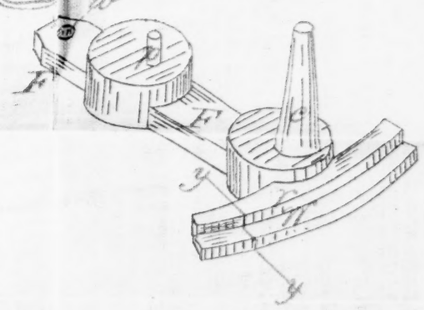
Improvement in Harvesters.

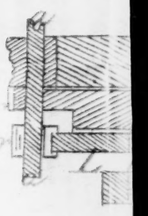
Figure 6.



Witnesses

Figure 4.





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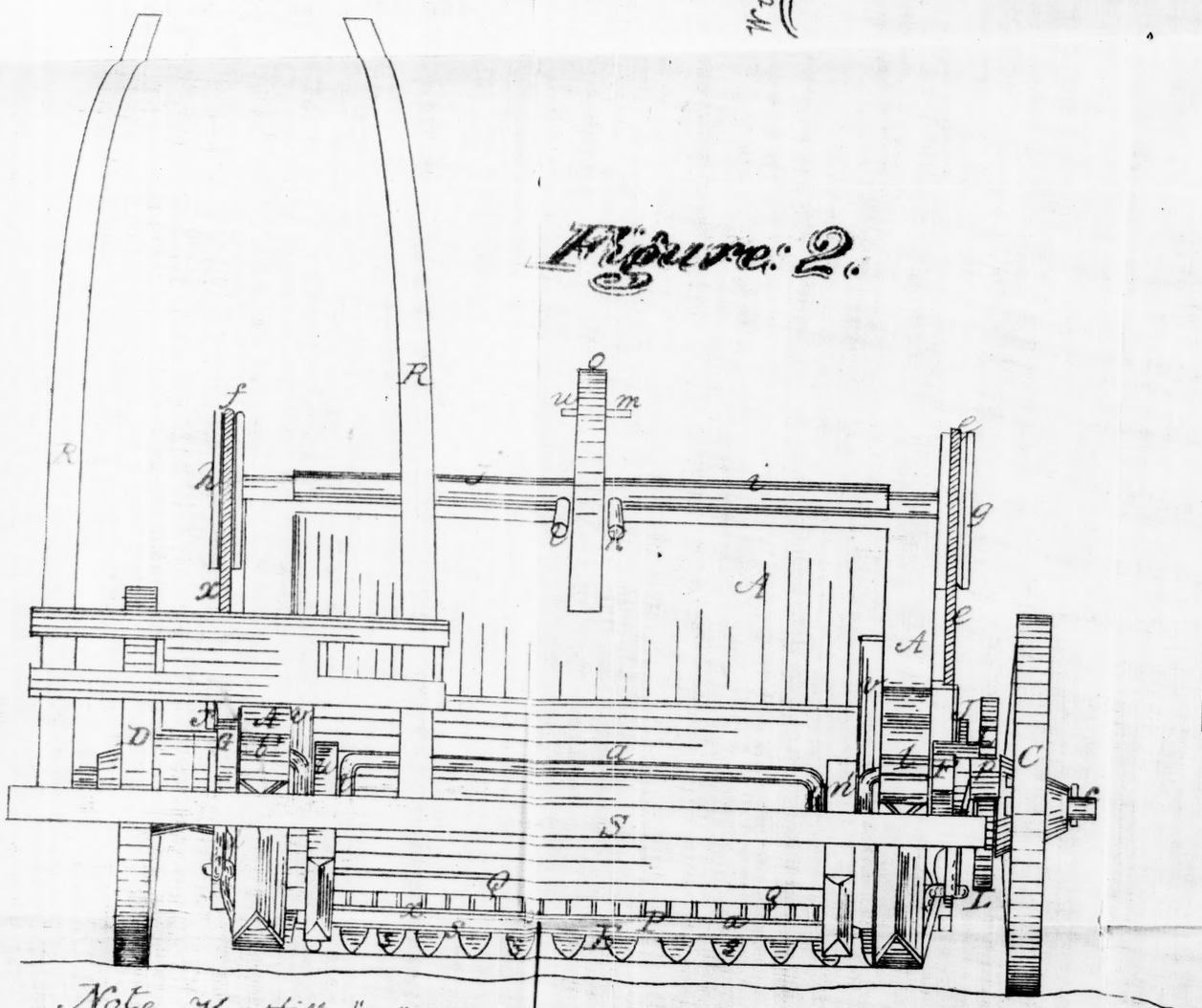
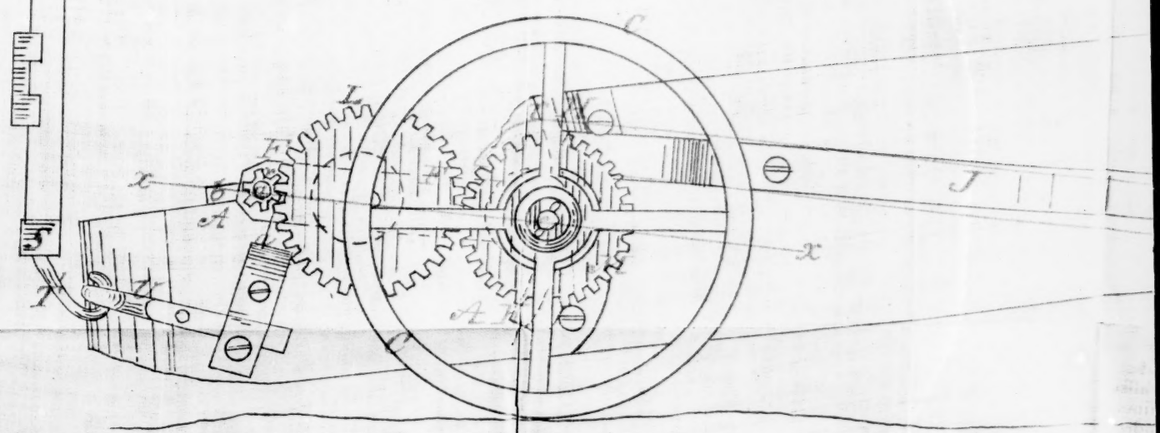


Figure 7.

Figure 1.



Note The thills "R" drawn on the wrong side of the machine

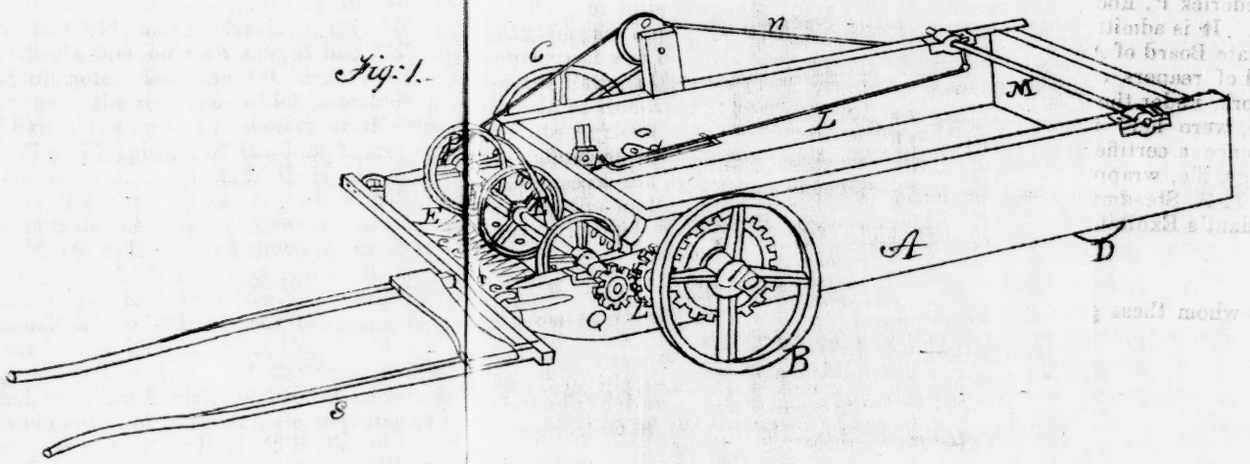
Correctly attached.

Specification and Drawings Prepared at the Office of J.
Arthur L. M. Intire Dep P. Off.

No 2432 Whitley vs Swayne Page 62

Thos. S. Steadman's
Clover Harvester

Fig: 1.



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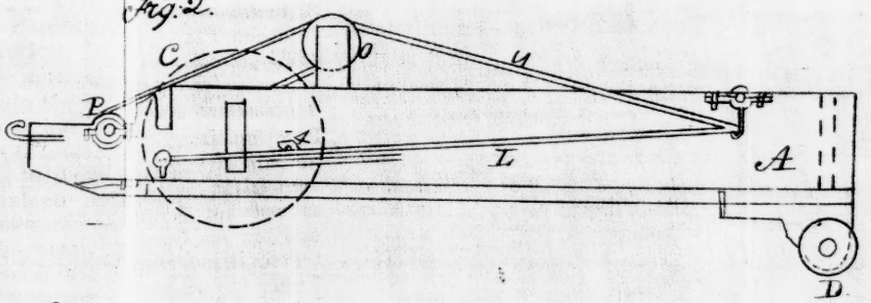

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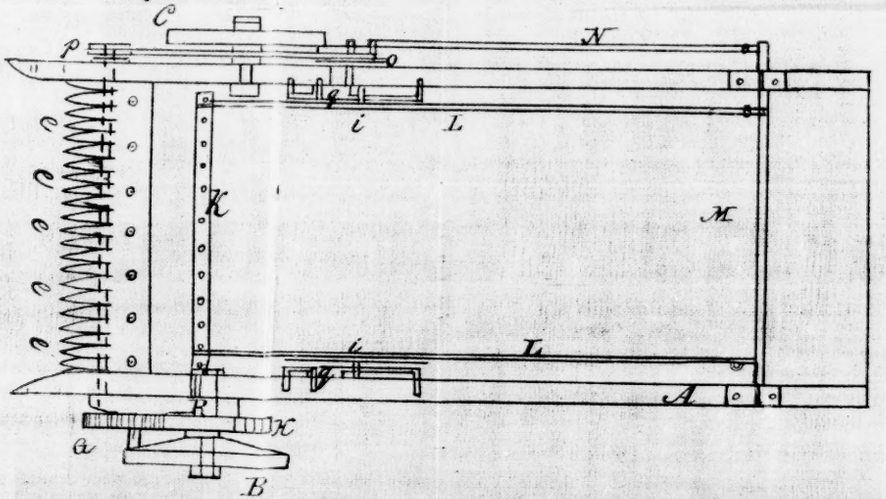


No 2443 Whiteley vs. Swayne

Page 81.

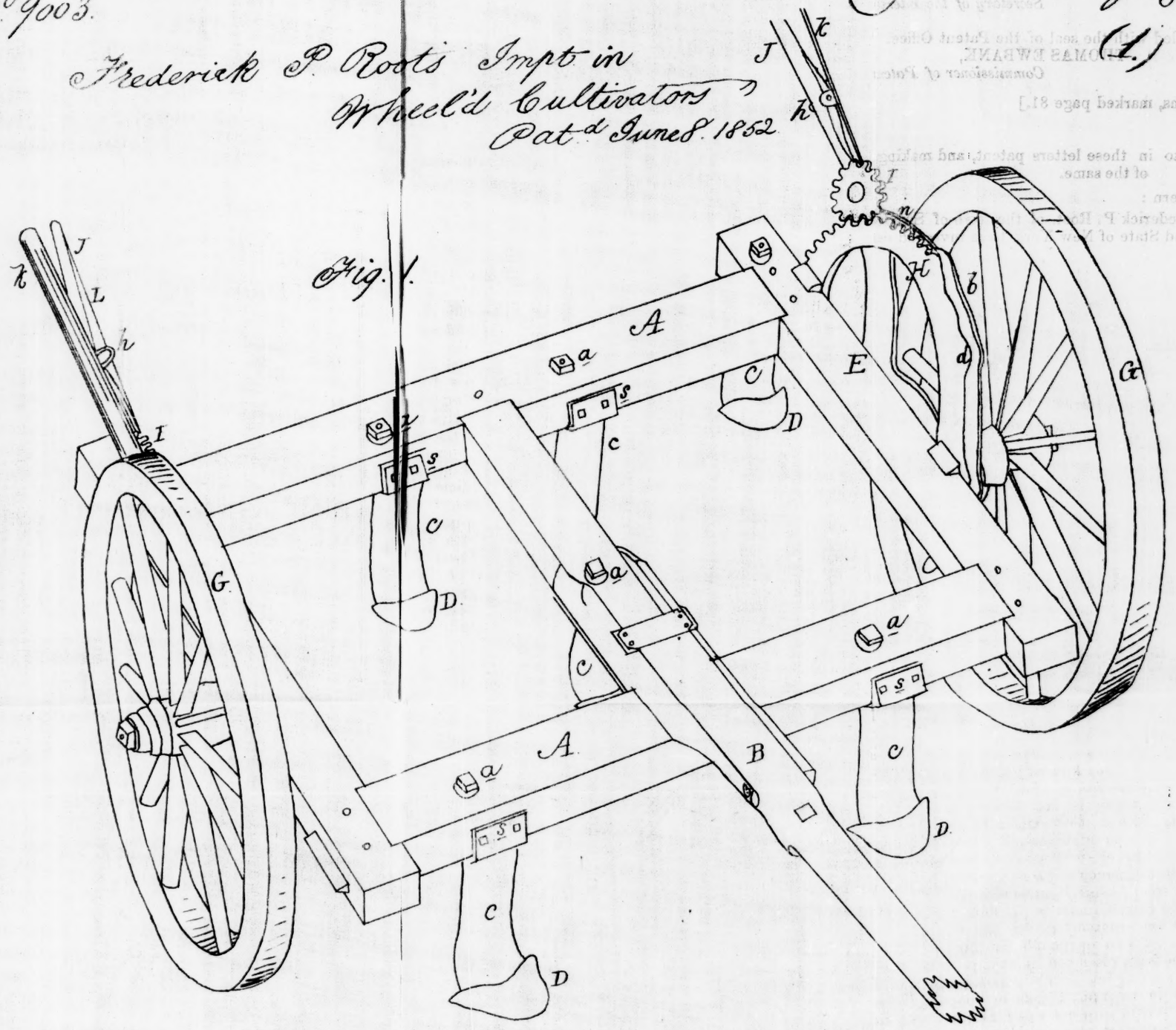
(1.)

No 9003.

Frederick P. Roots Impt in Wheel'd Cultivators

Pat^d June 8. 1852

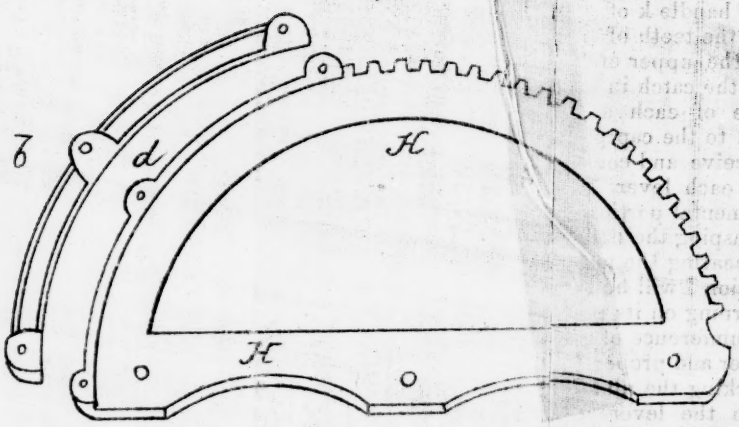
Fig. 1.



No 243 Whiteley vs Swayne Page 87

(2.)

Fig: 2.



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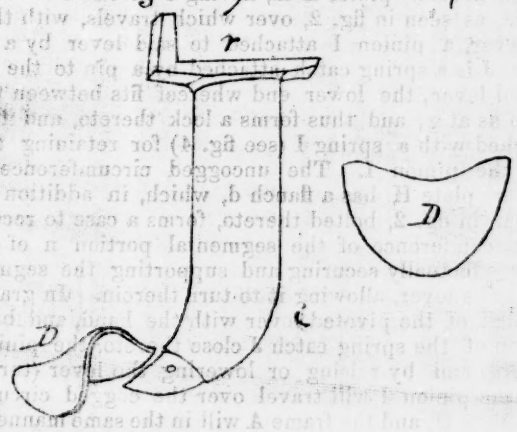

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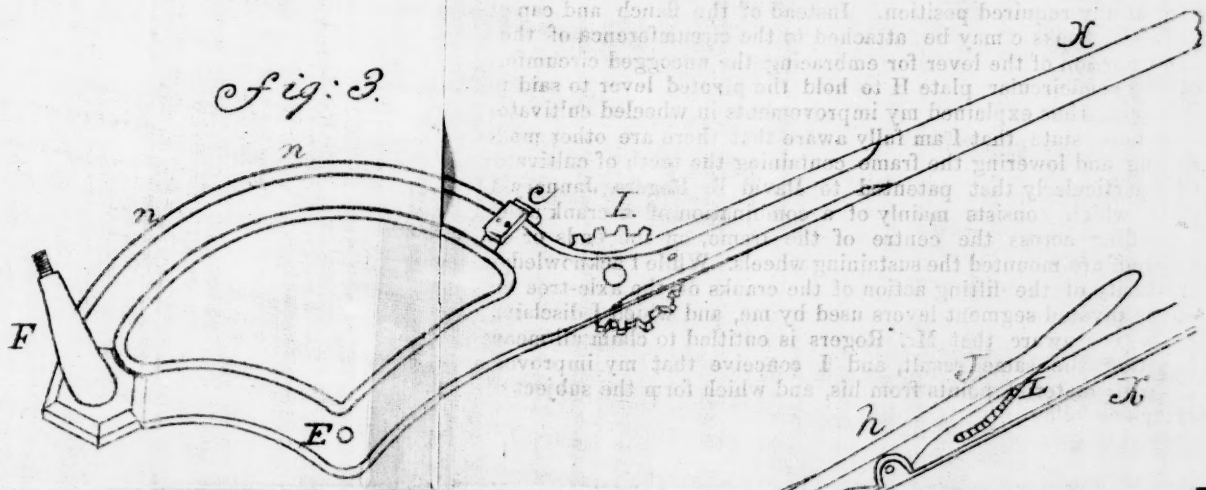

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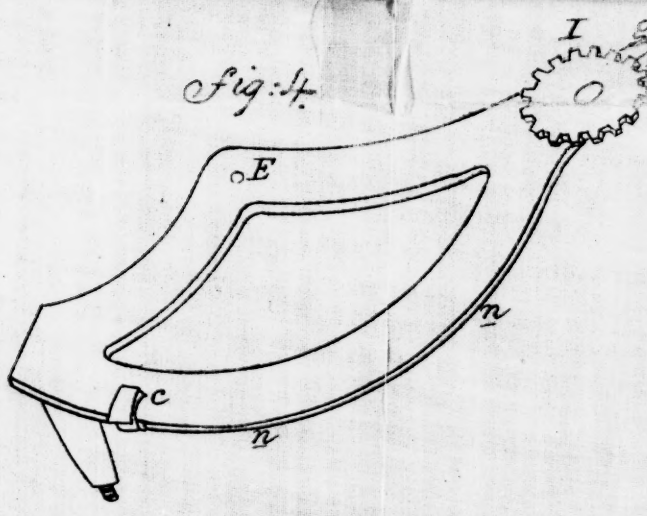

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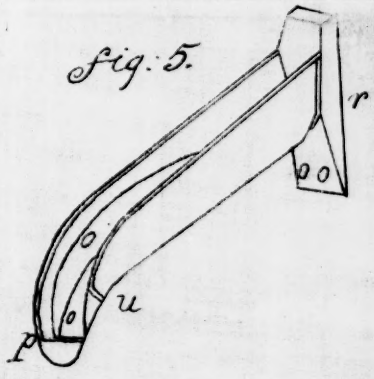
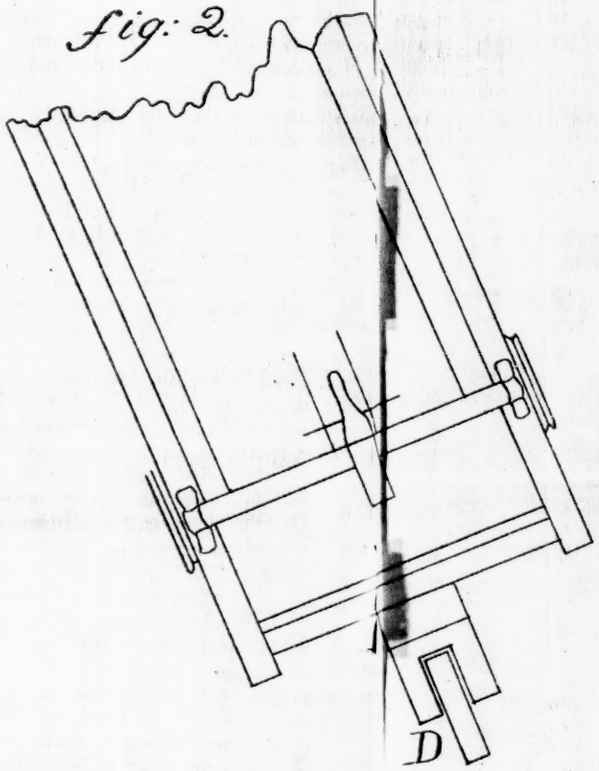


№ 2443 Whiteley.
Swayne
6 Page 119.

fig: 2.



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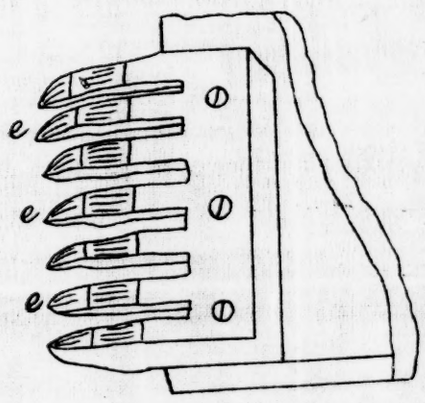

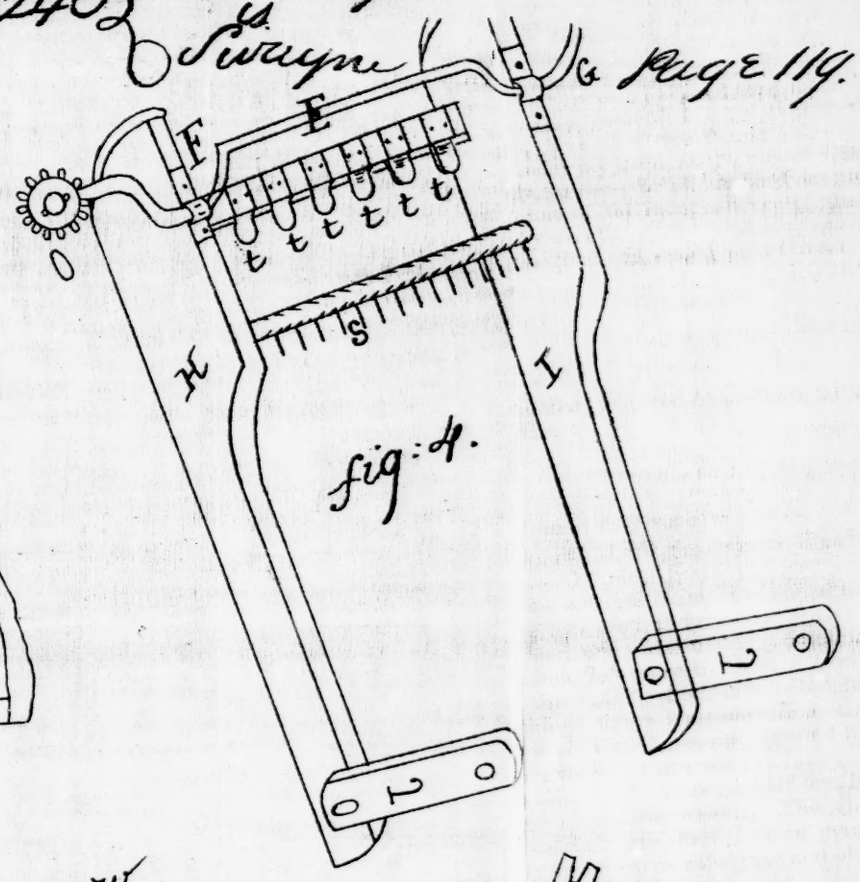

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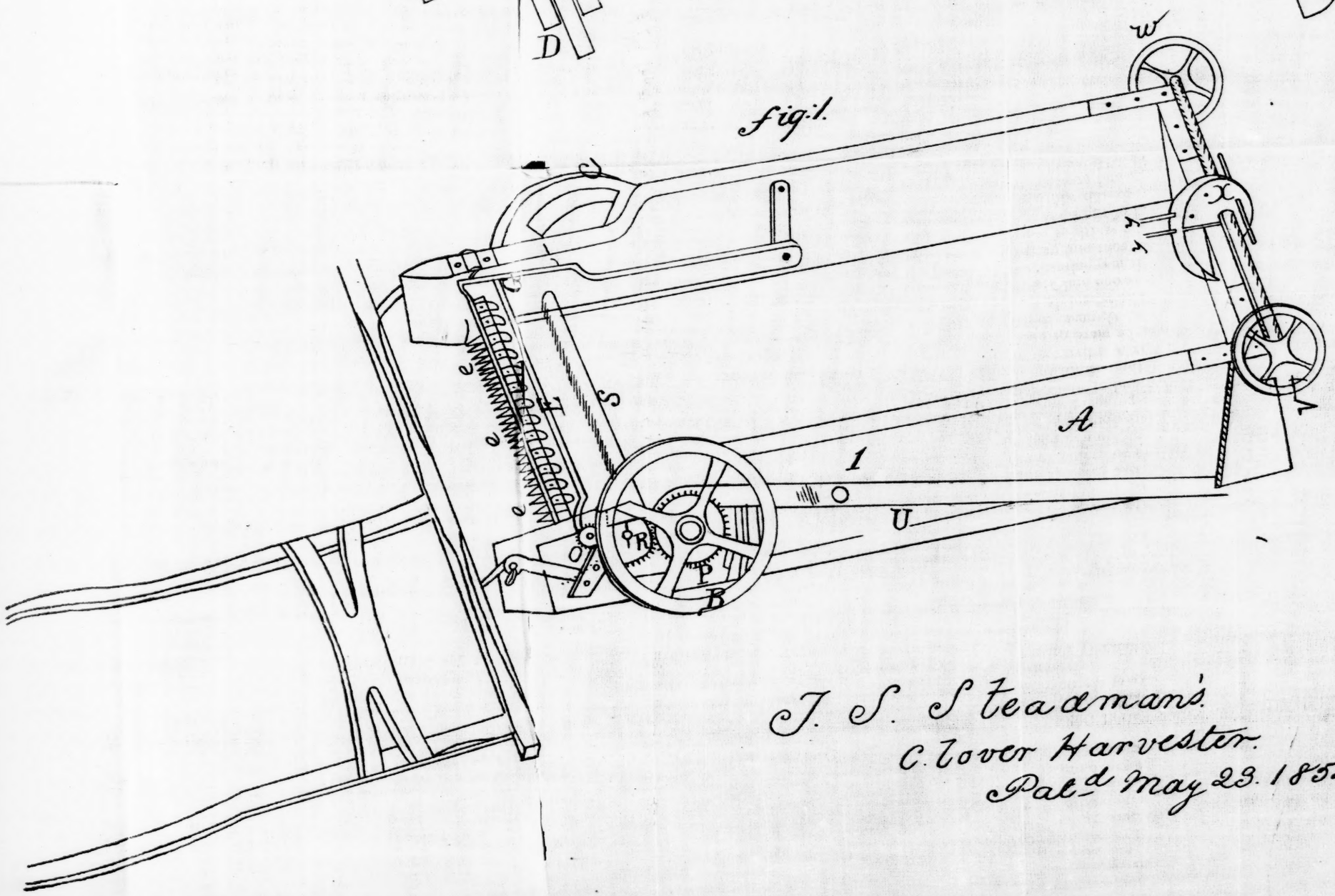
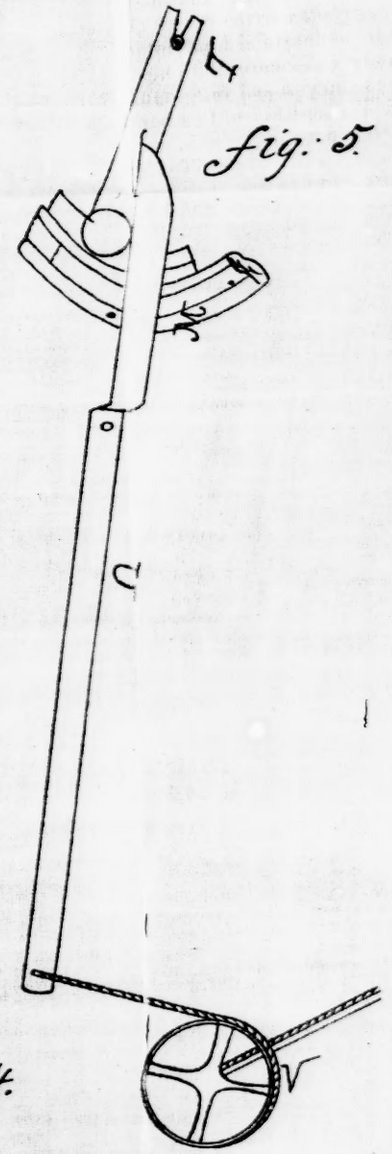
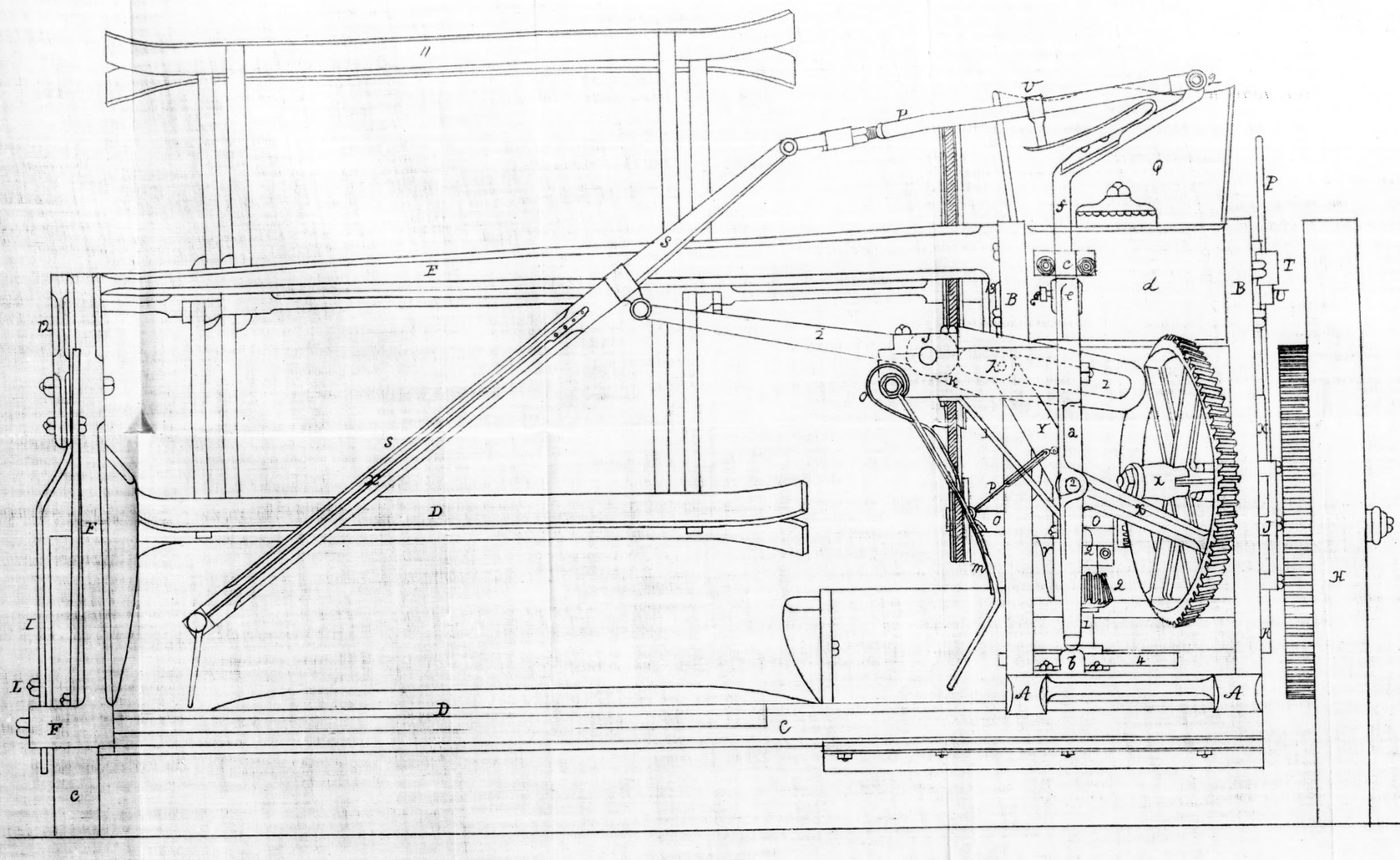




J. S. Steadman's
Clover Harvester.
Patd May 23. 1854.

fig: 2.

No 2463 Whitney & Swayne Page 144.



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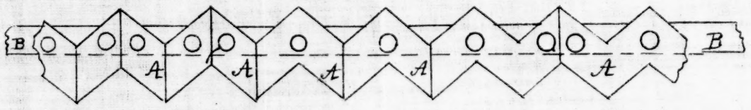

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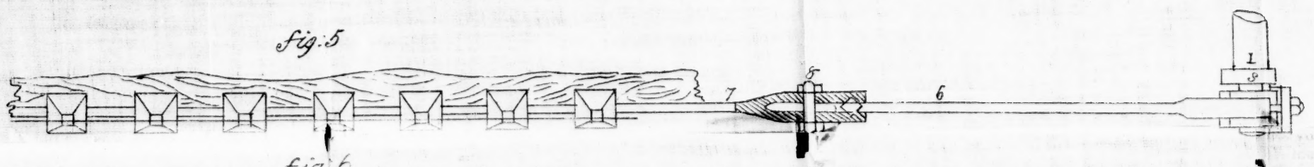
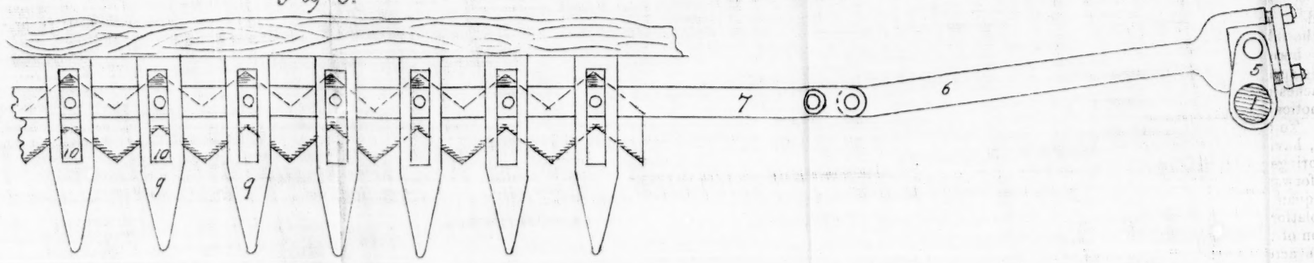


fig: 6.



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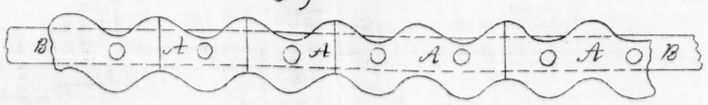


U. D. 1862 Nov 4th 1862 No 36726
Johnson's Specification.

Fig. 1.

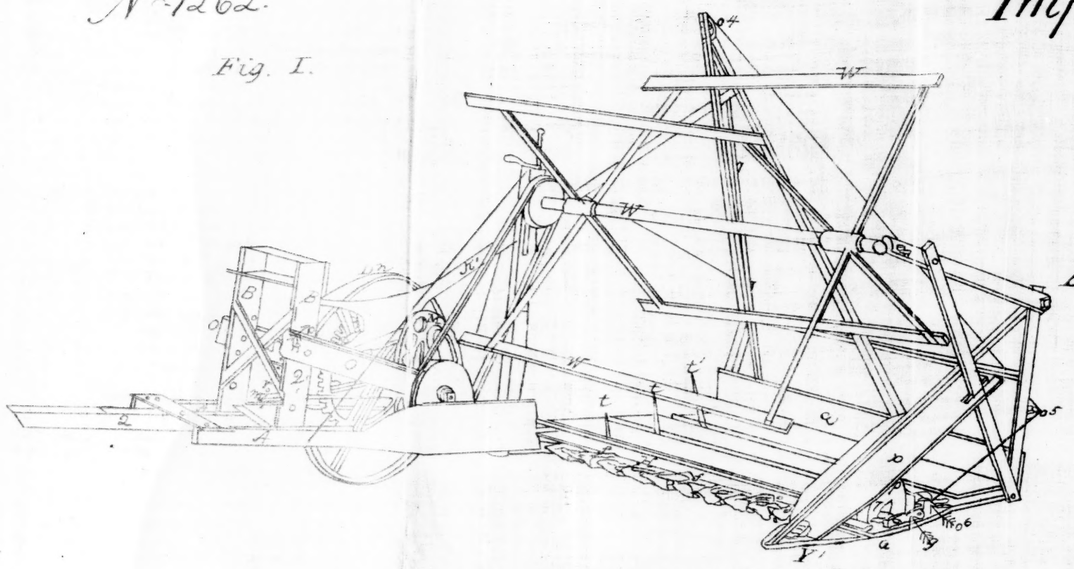
Fig. 2.

Fig. 3.

Fig. 4.

No. 1262.

Fig. I.



Imp'd Reaping Machine

D.M. Osborne

and Auburn N.Y.

Wm A Kirby

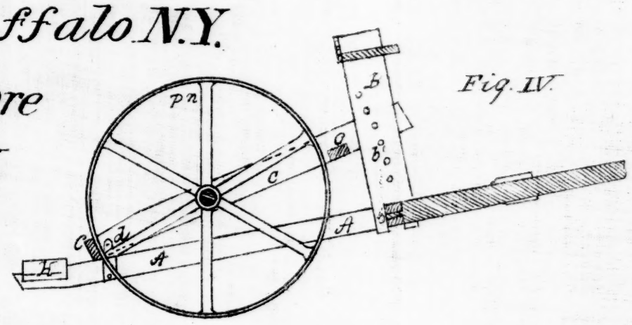
Assignees of Buffalo N.Y.

Byron Densmore

Sweden, N.Y.

No. 2432 { Whiteley vs Wayne } Pag. 154.

Fig. IV.



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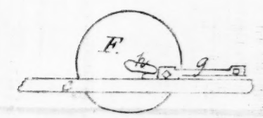


Fig. VI.

Fig. VII.

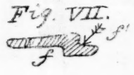
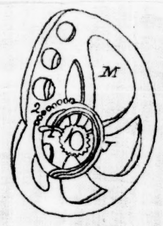


Fig. VIII.

Fig. V.



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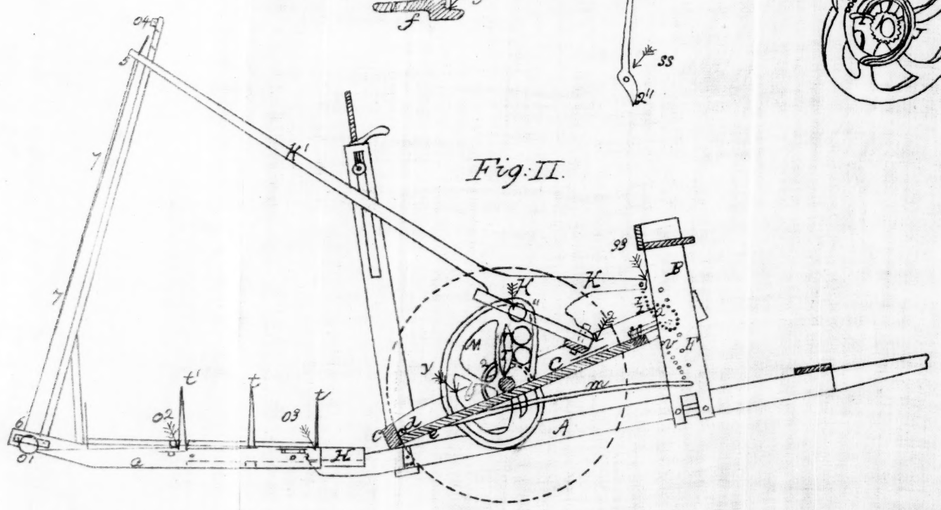

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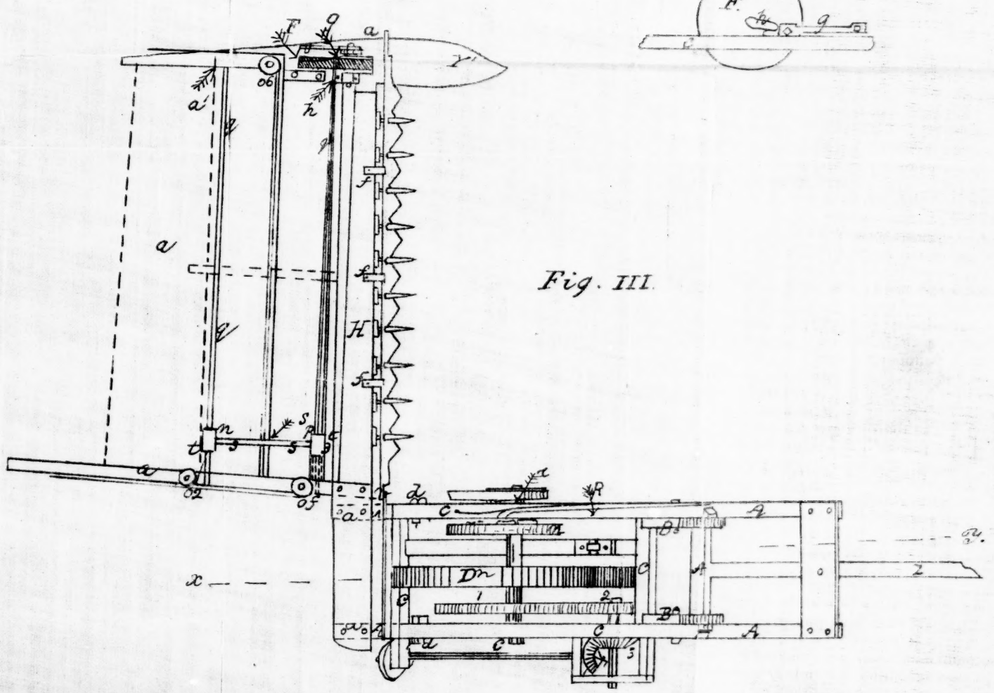


Witnesses } D.M. Osborne for self. } assignees
D.M. Osborne atty. for W.A. Kirby. } of Byron Densmore.

Correctly attached
L. Bosworth, Act. Def. Pat. Office.

W.H. Forbush, Pat. Atty. Buffalo N.Y.

W.H. Forbush, Del.

Fig: 9

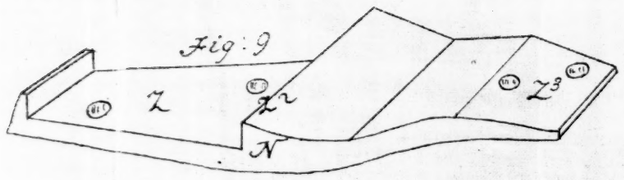
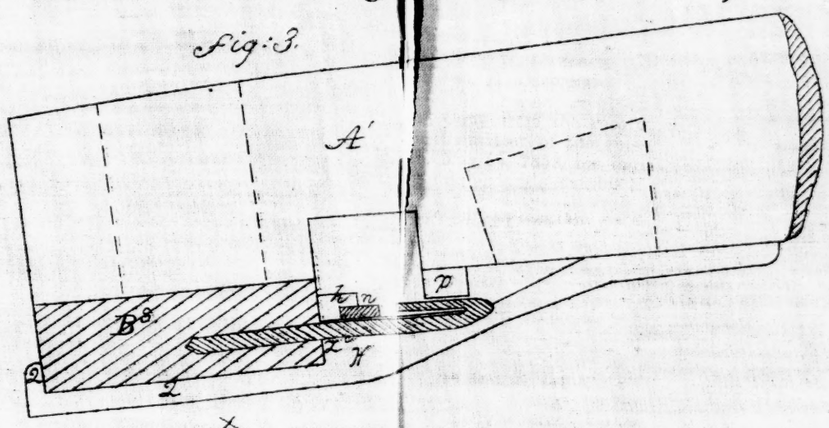
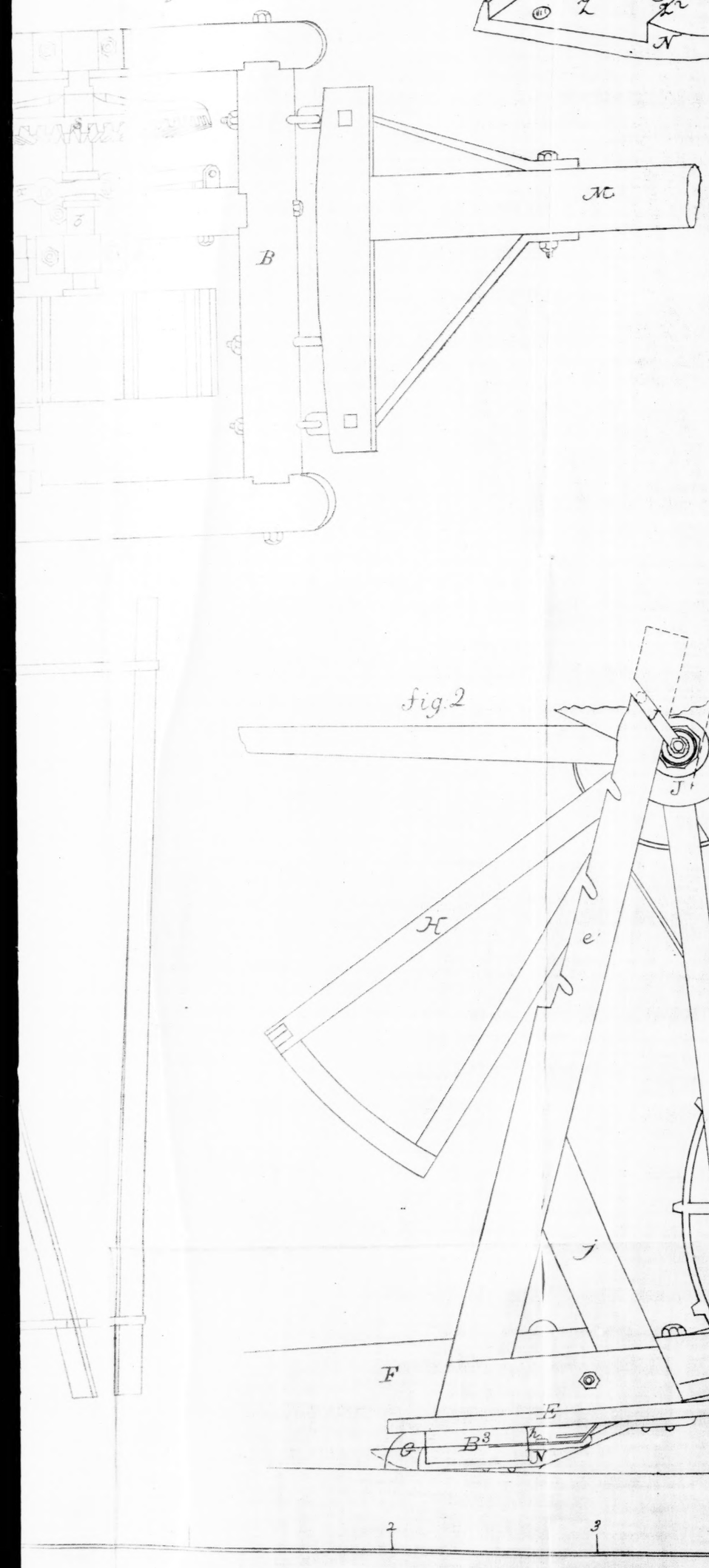


Fig: 3.





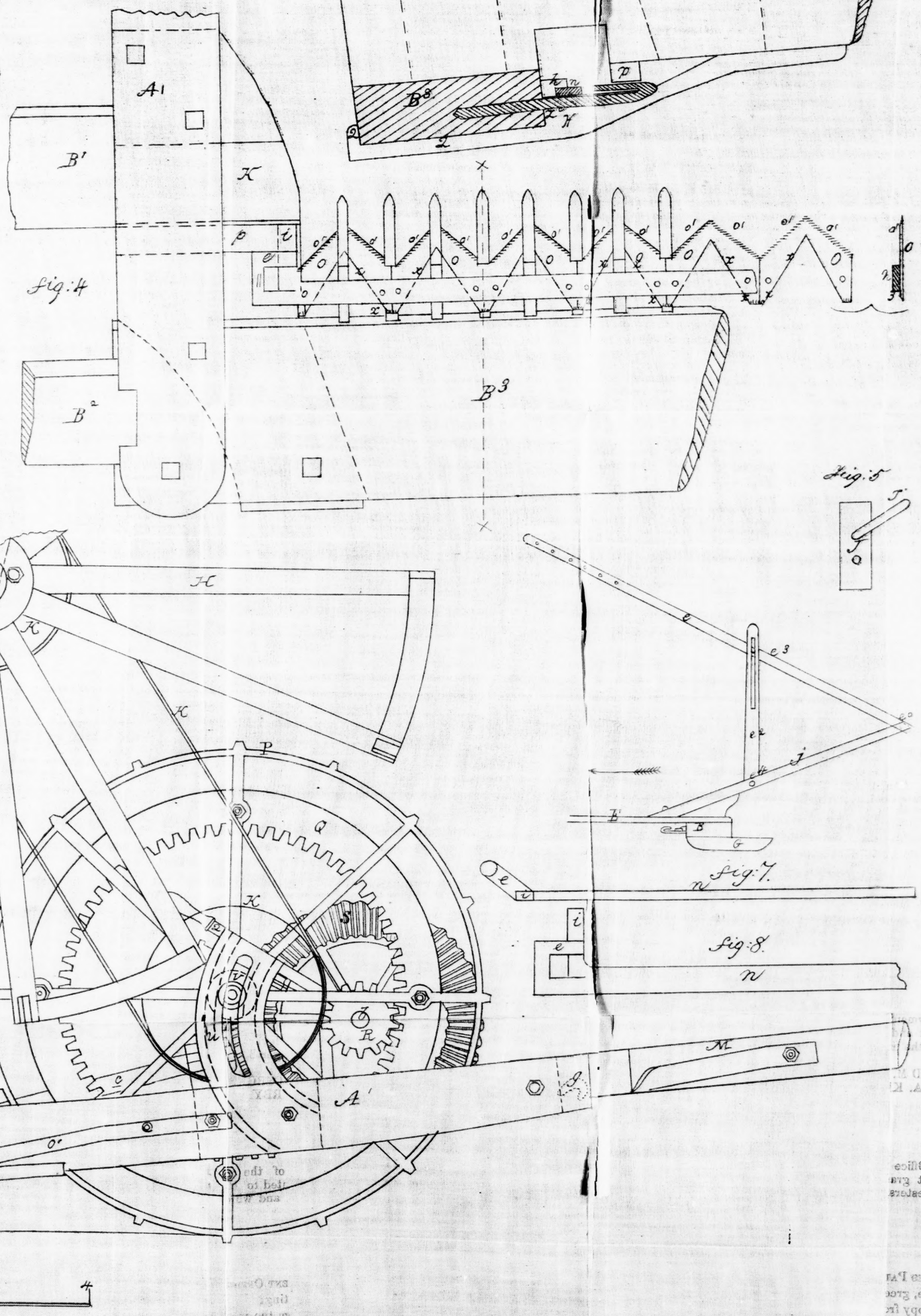


Fig: 4

Fig: 5

fig. 2

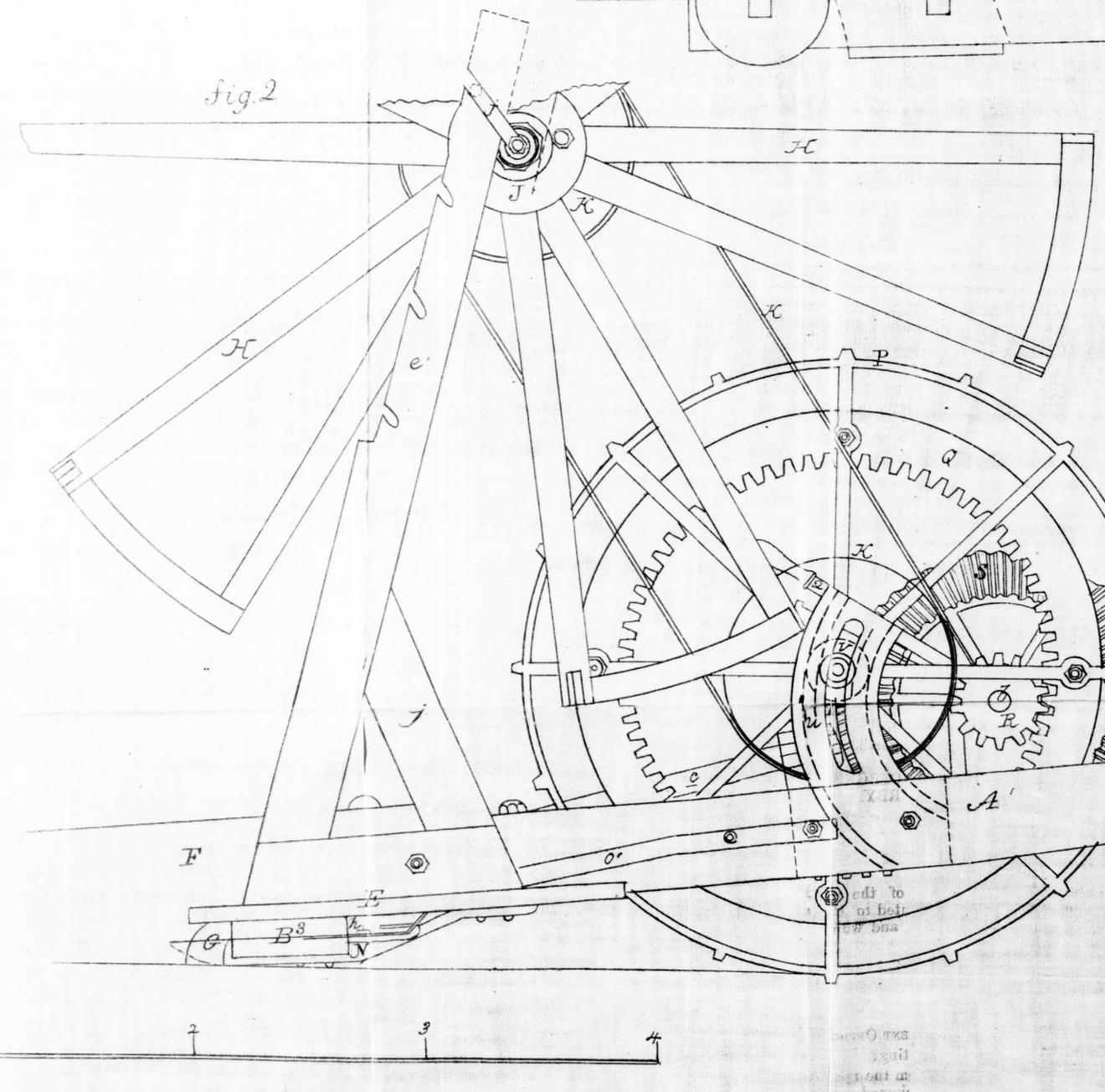
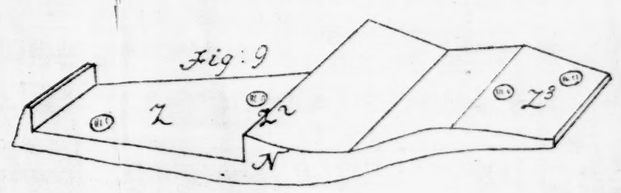


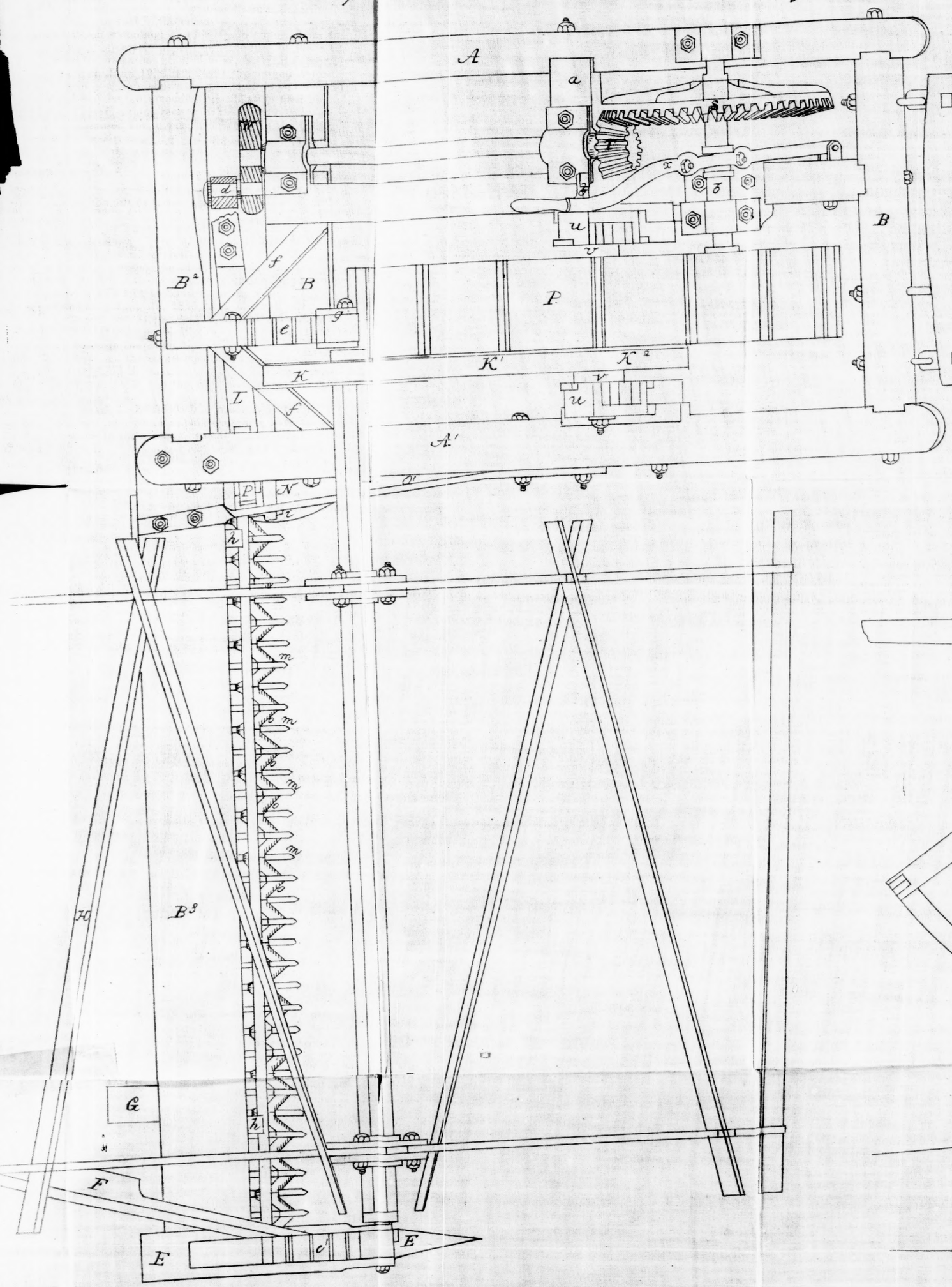
fig: 7.

fig: 8.

Henry Green - Impt. in Harvesters
Reissued May 25. 1858

Fig: 9





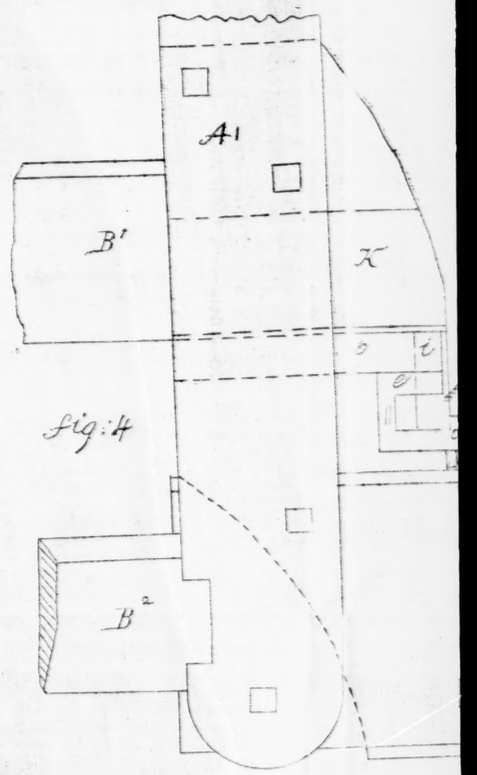
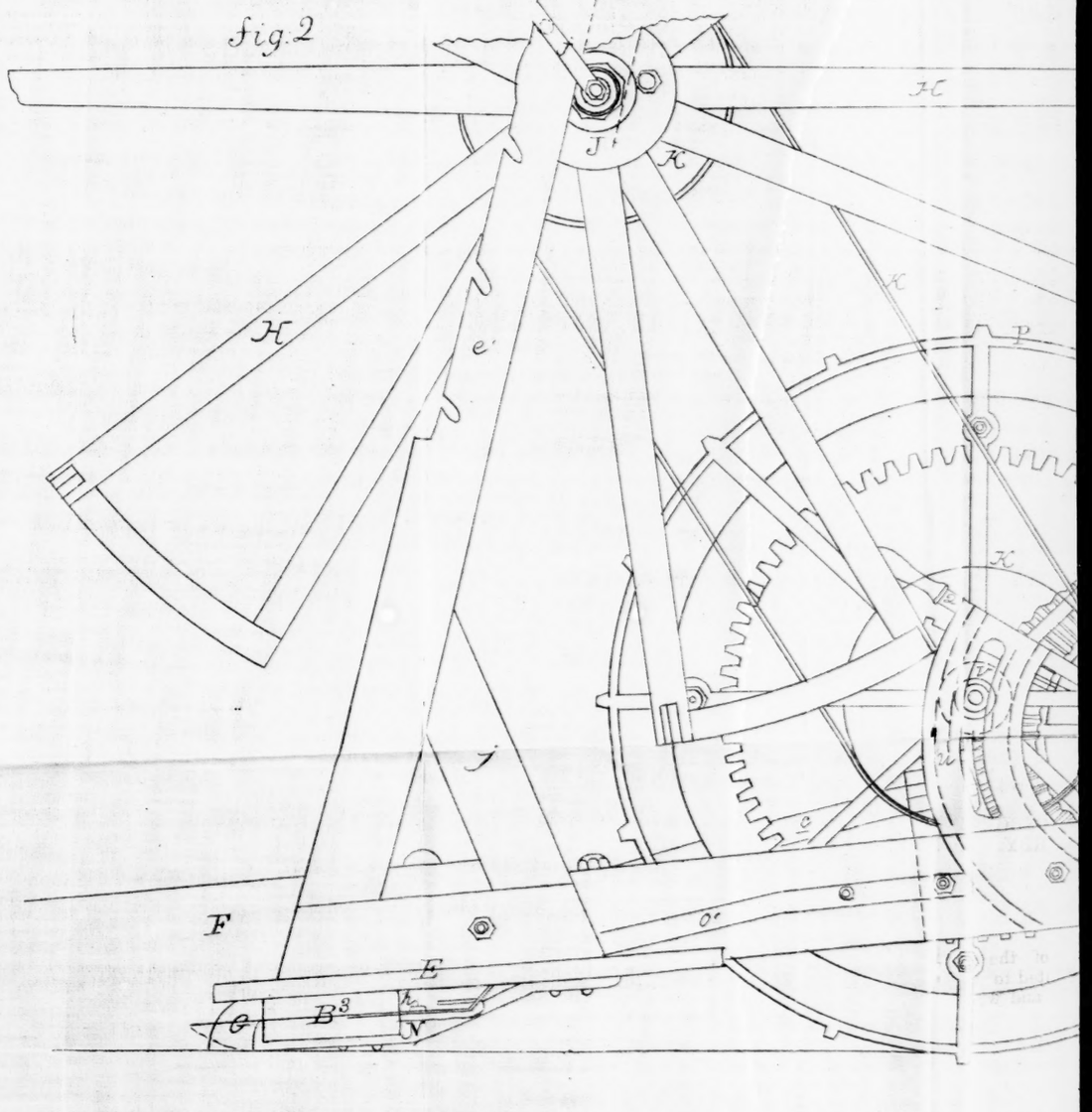
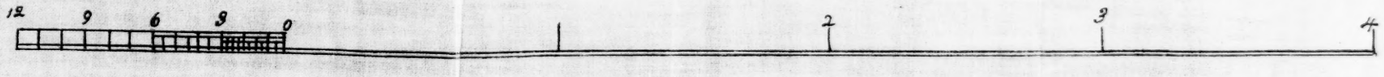


fig:4

fig.2





Attached to Exhibit "A" of the Bill. pages.
No. 24307

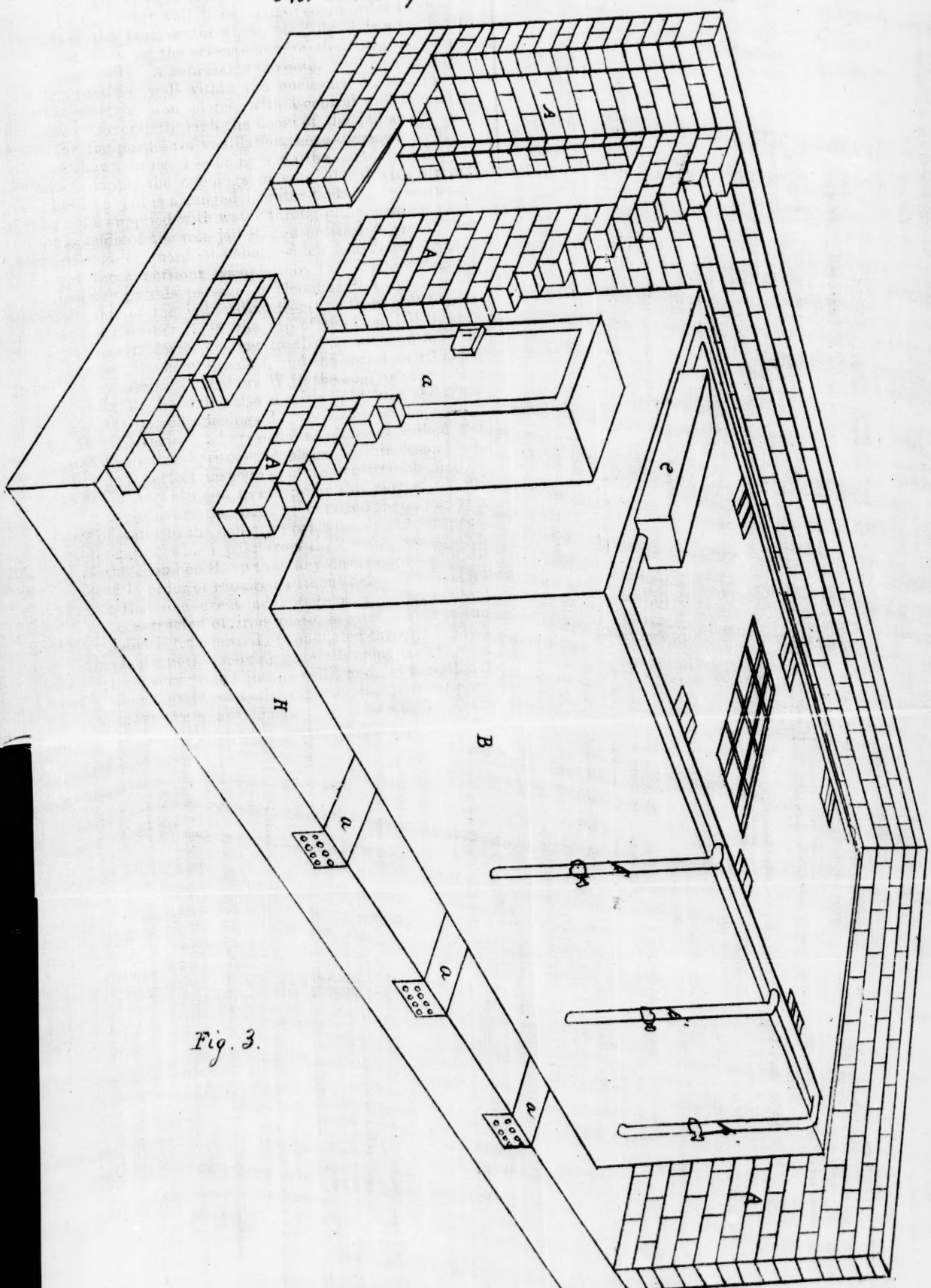


Fig. 3.

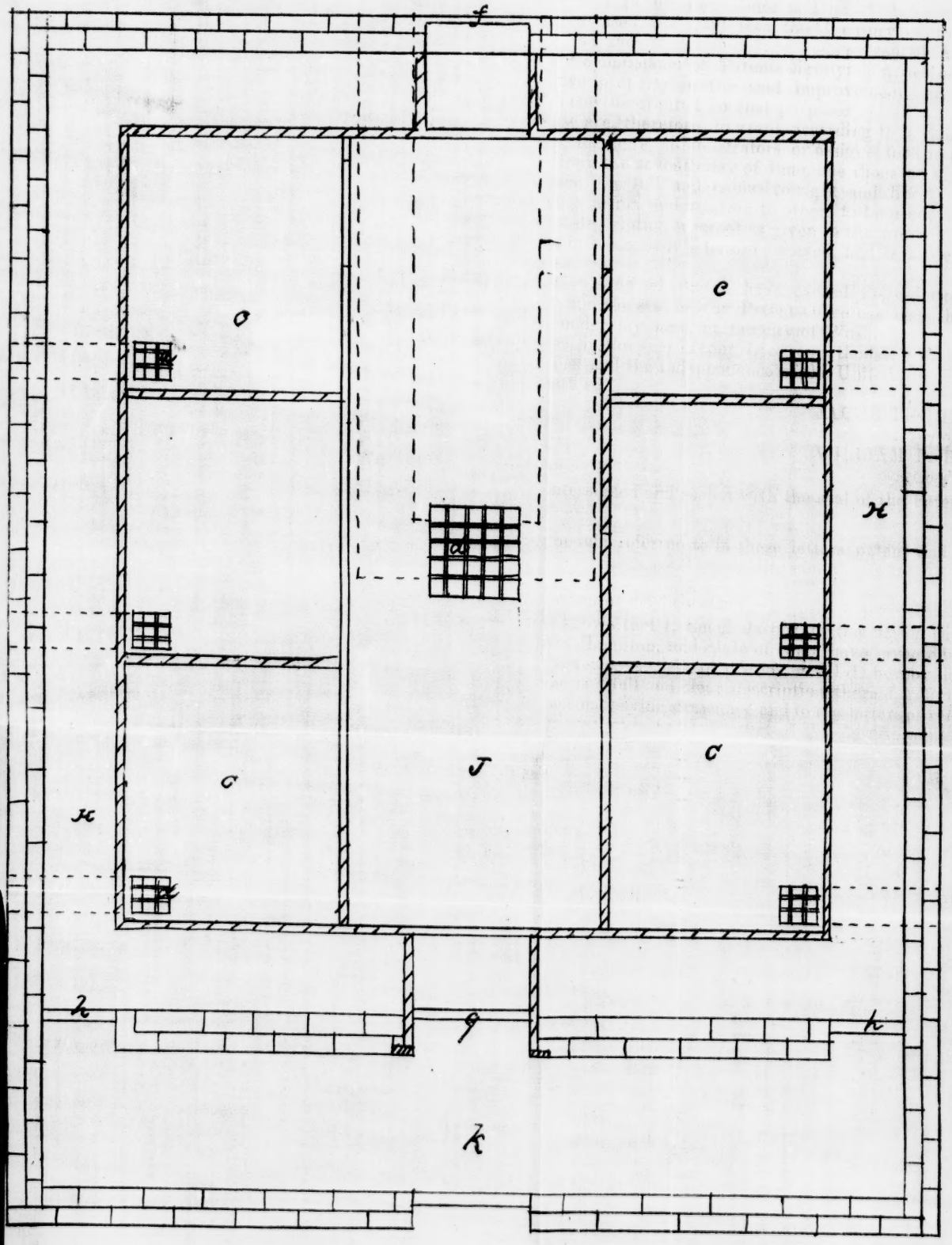
No. 100 Jacobs. vs Baker

No. 3

1

Attached to Exhibit "A" of the Bill page 5.
No 24307

Fig. 1.



No 100 Jacobs
vs
Baker

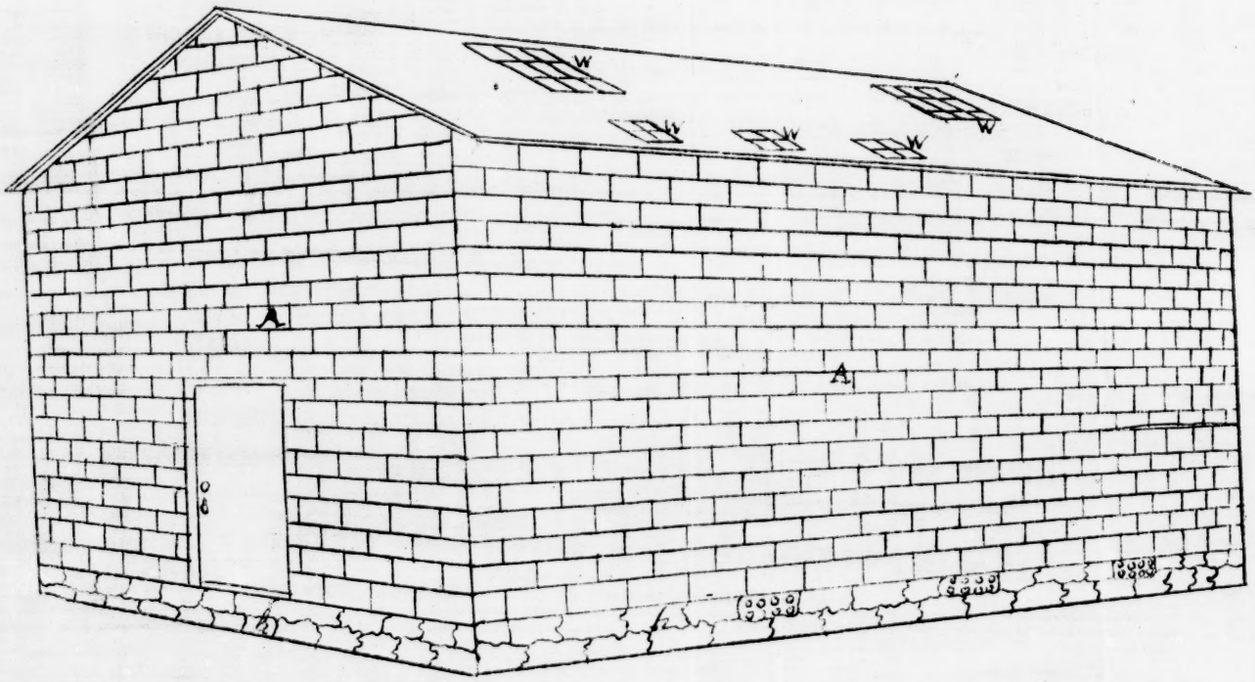
No 1.

Attached to Exhibit "A" of the Bill –

Page 5.

No. 24307

Fig. 2.



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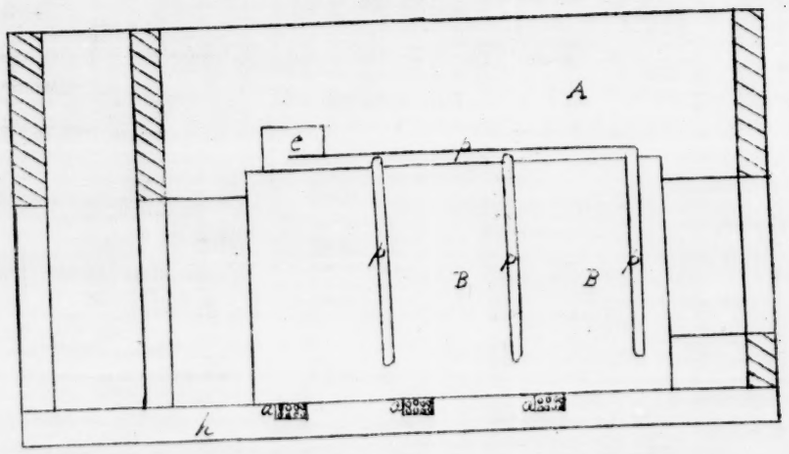
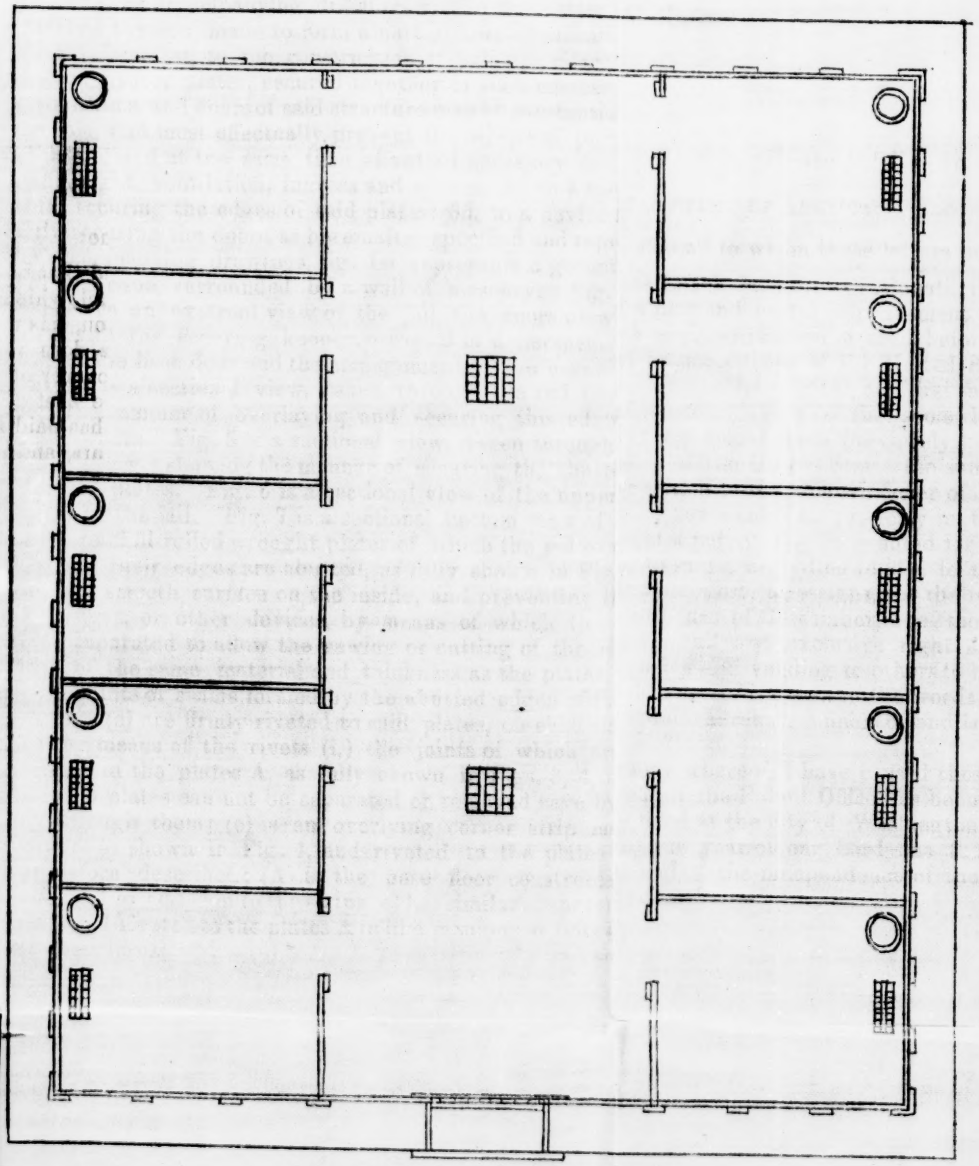


No 100 { Jacobs et Baker

No 2

Attached to Exhibit "B" of the Bill
No. 26500. pages

Fig. 1.



No=100 { Jacobs vs. Baker

No 4.

Attached to Exhibit "C" of the Bill
No. 27222. Page 5.

Fig. 1.

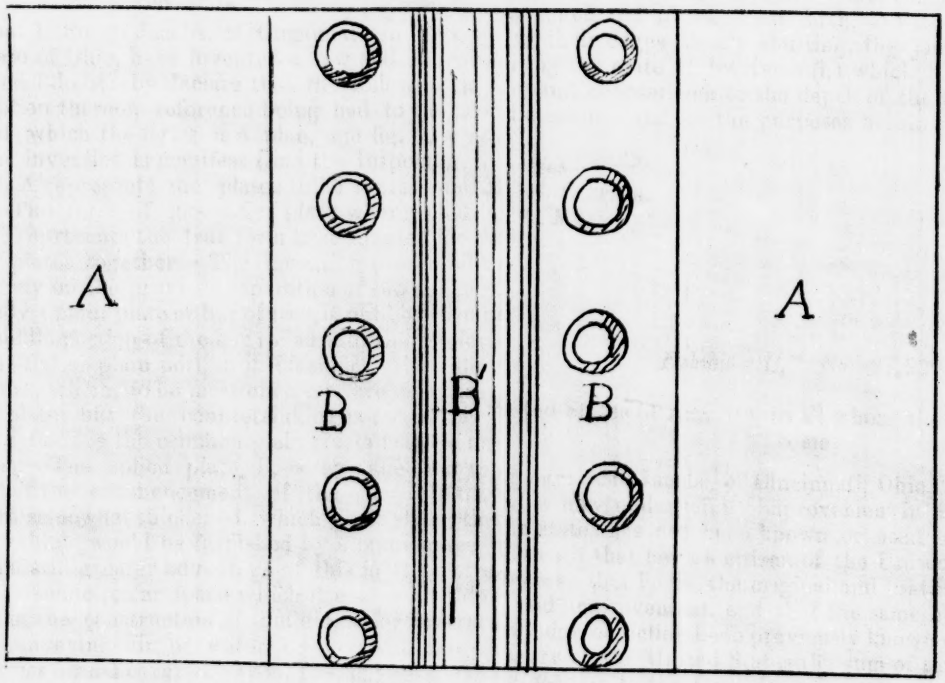
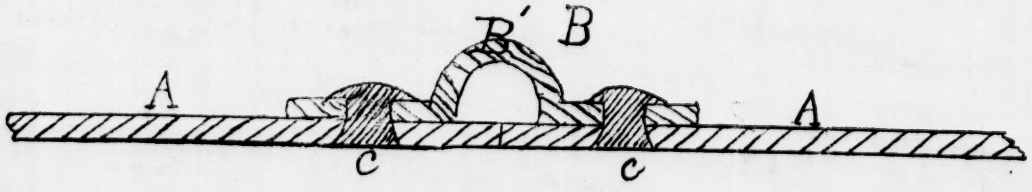


Fig. 2.



No. 100 { Jacobs
vs.
Baker

No. 7

Attached to "Exhibit D" of the Bill page 5.

No. 29.282.

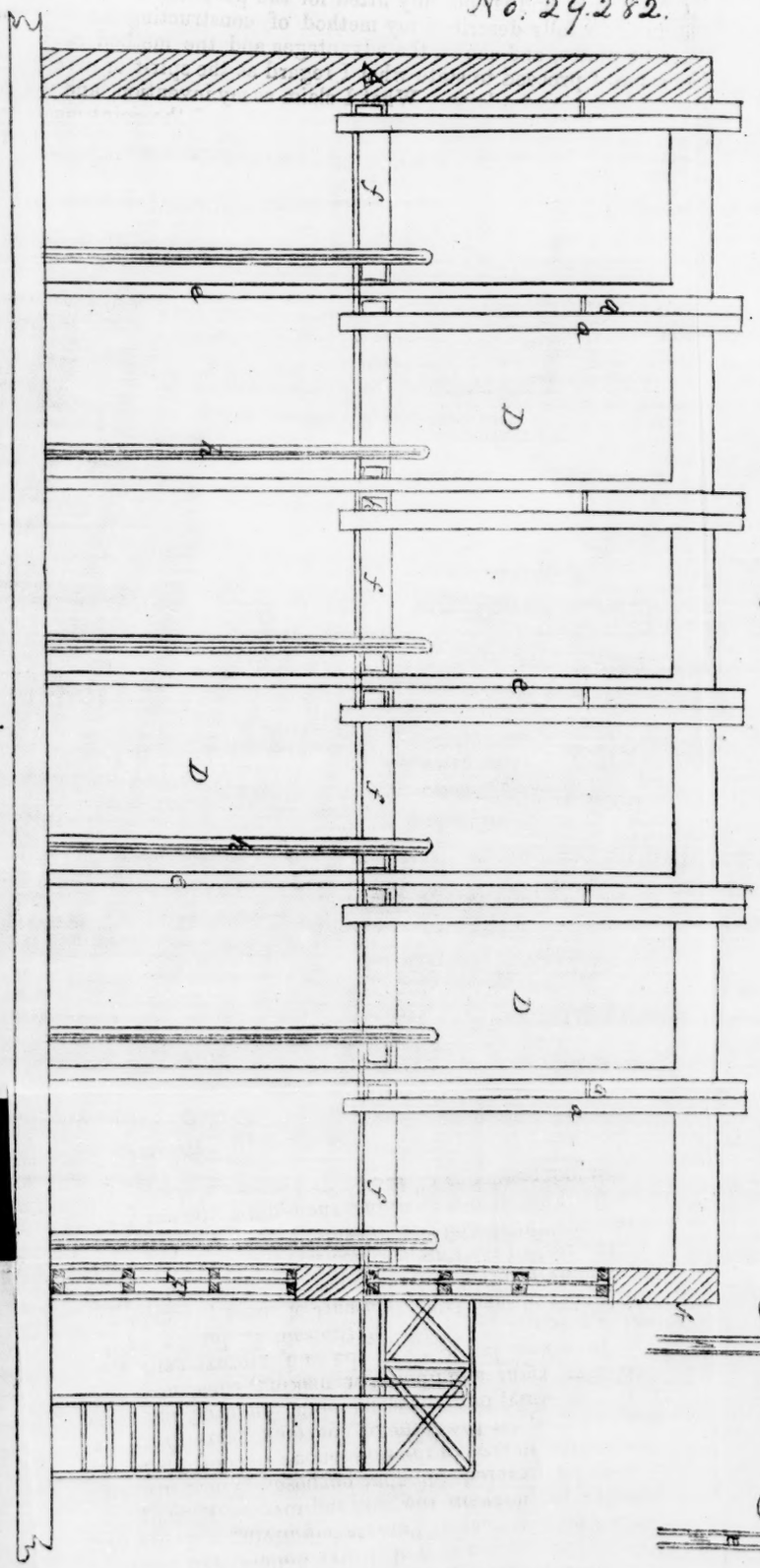


Fig. 2.

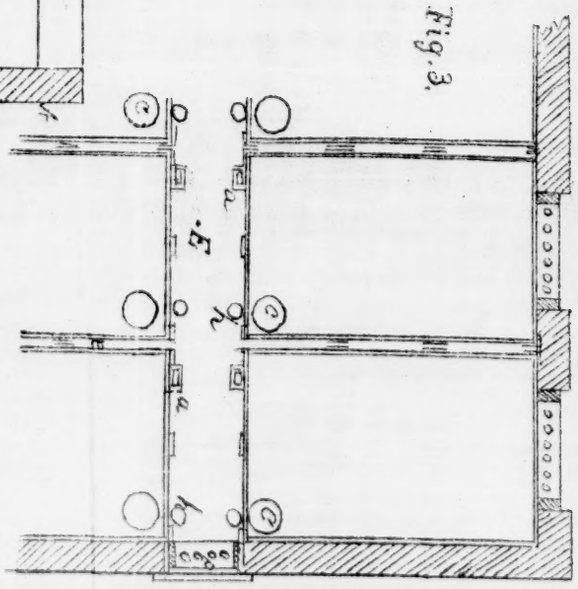
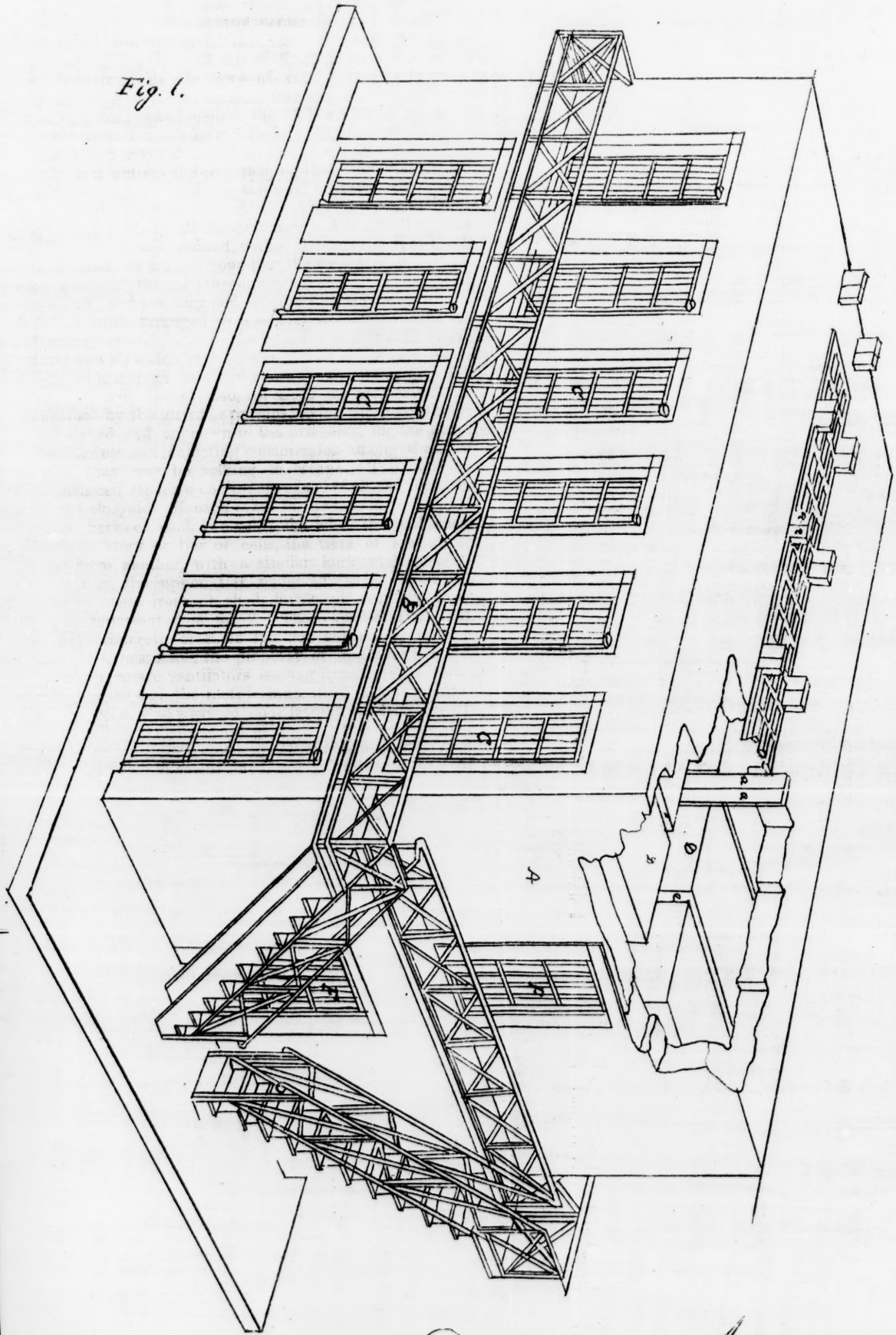


Fig. 3.

No. 100 Jacobs vs. Baker. No. 9.

Attached to "Exhibit D" of the Bill
No 29282. Page 5.

Fig. 1.

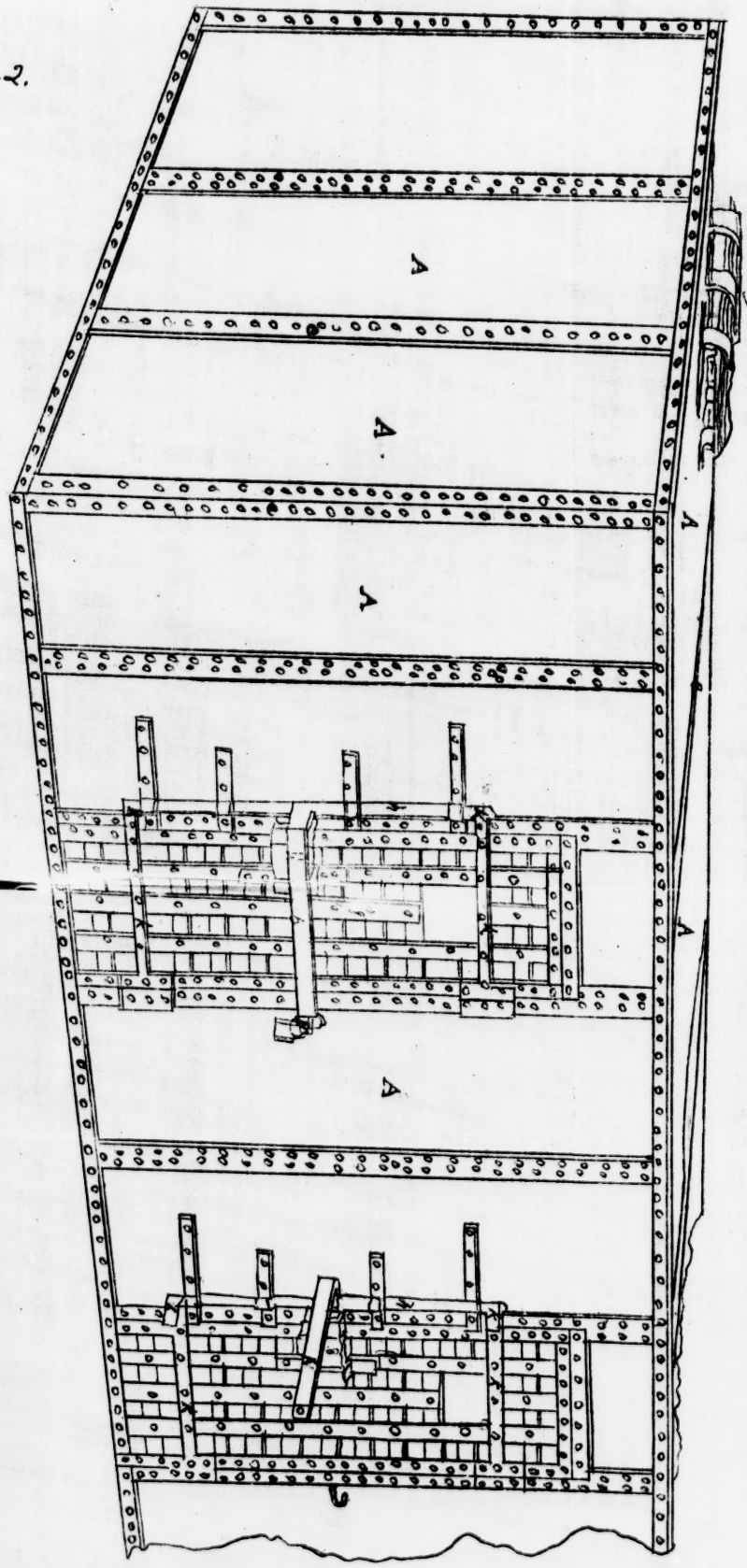


No 100 { Jacobs vs. Baker } No 8

Attached to Exhibit B. of the Bill
No. 26500.

Page 5.

Fig. 2.



No 100 { Jacobs vs. Baker } No 5

Attached to Exhibit "B" of the Bill—

No. 26500. Page 5.

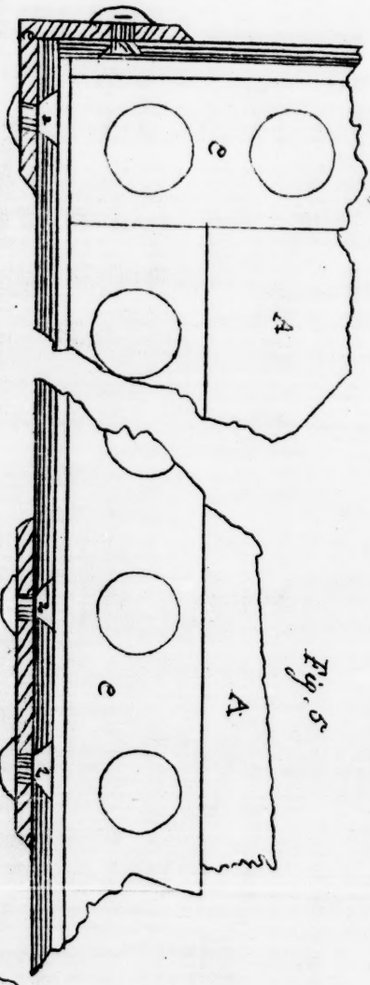
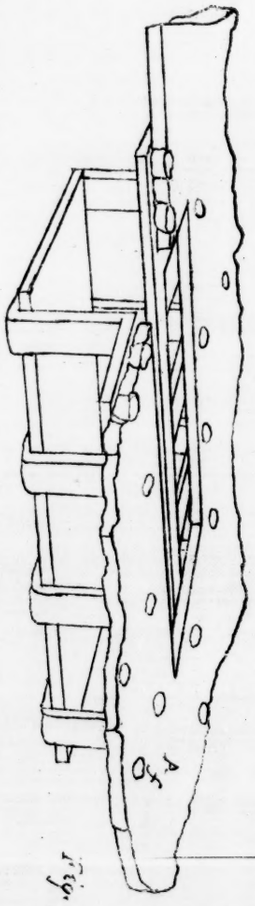


Fig. 4.

Fig. 5.



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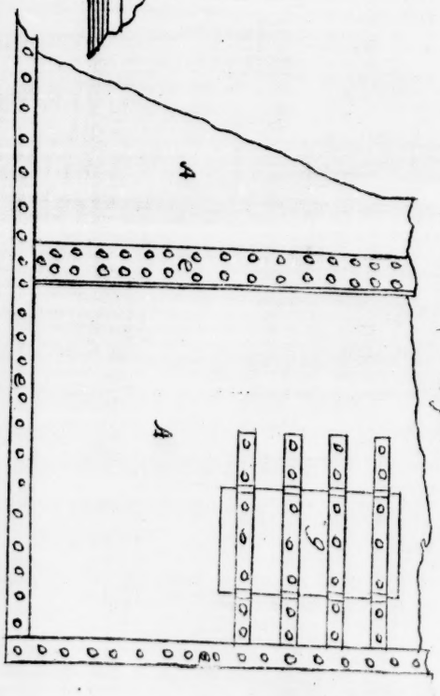

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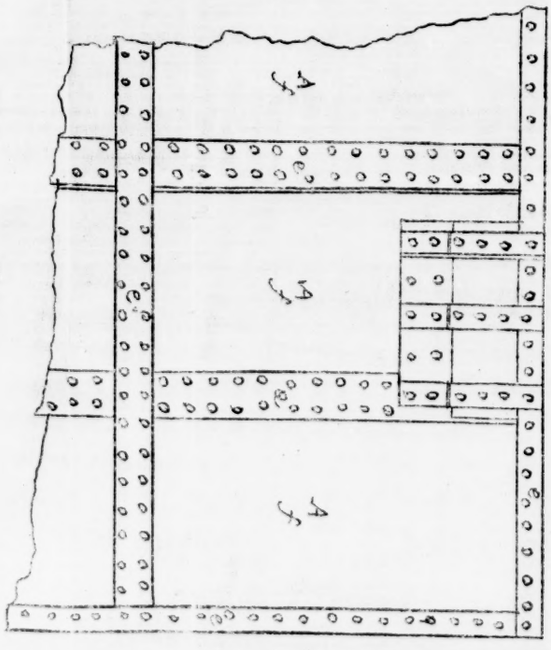
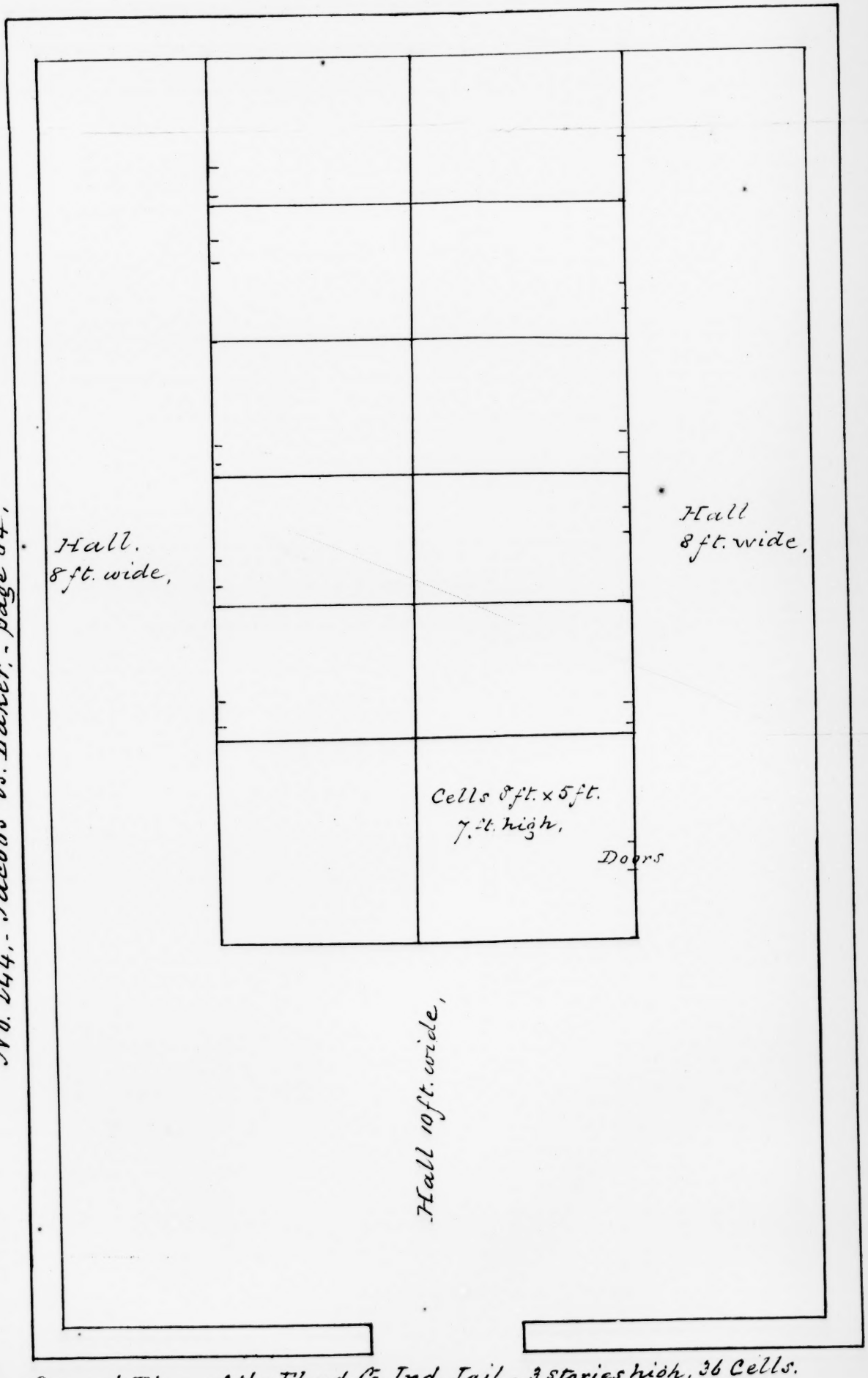


Fig. 7.

No. 100. Jacobs vs. Baker No. 6

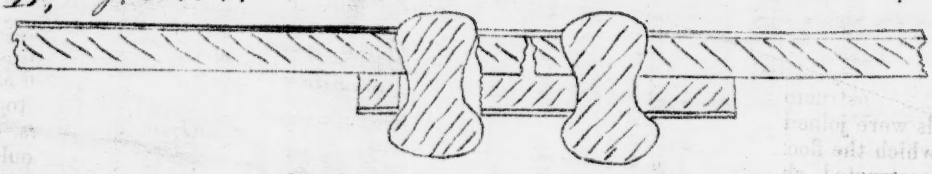
Exhibit "B.T.T.C."



No. 244. - Jacobs vs. Baker, - page 64.

Ground Plan of the Floyd Co. Ind. Jail, - 3 stories high. 36 Cells.

Exhibit B, J. W. H.



No. 244, Jacobs vs. Baker,

-page 73.

Exhibit C, J. W. H.

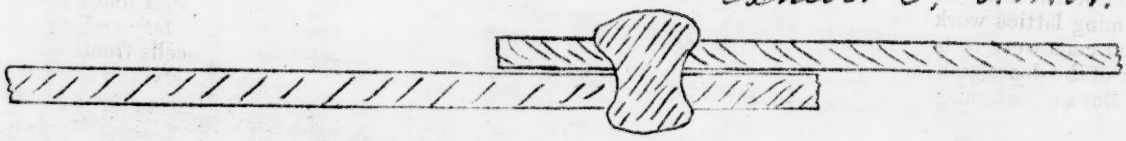
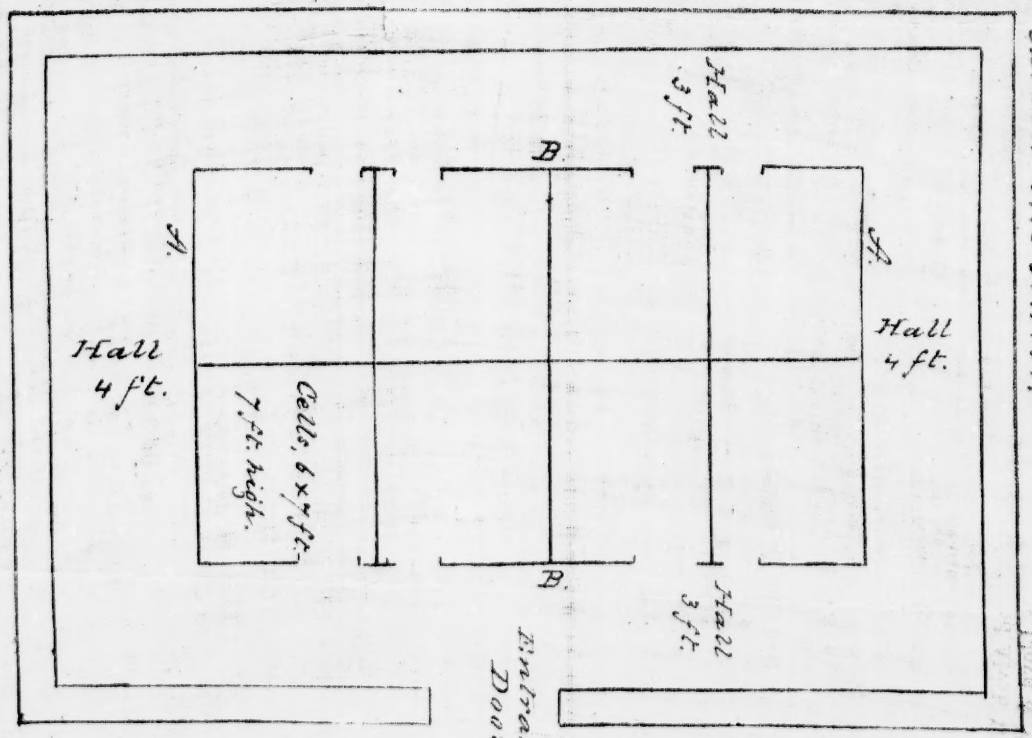


Exhibit A. - J. W. H.



No. 244, - Jacobs vs. Baker, - page 72.

Exhibit A. referred to by James Egan, - Daniel S. Major, N.P.

Exhibit A. J.E.

No. 244, - Jacobs vs. Baker, page 78,

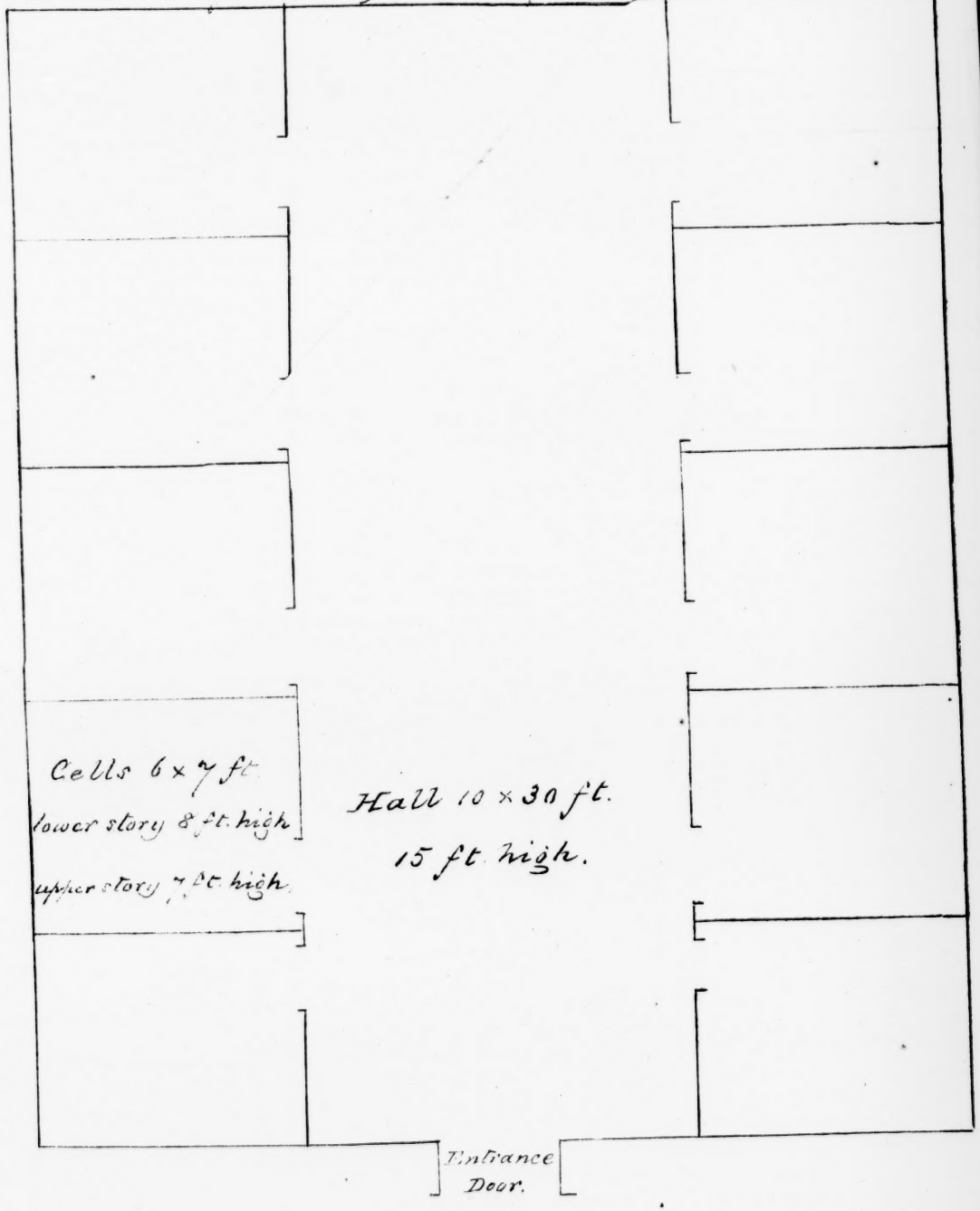
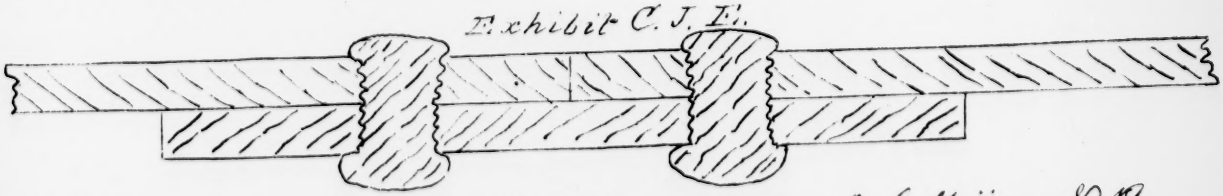


Exhibit B. J.E.

Exhibit C. J.E.

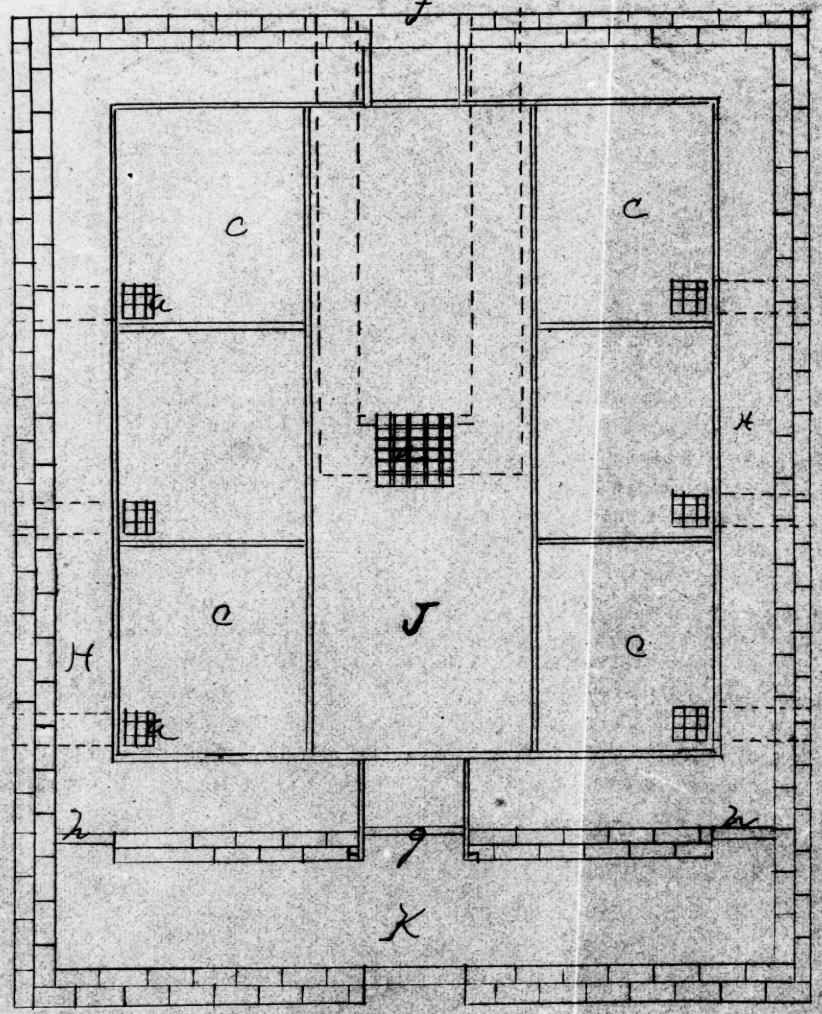


Exhibits B and C referred to by James Egan, - D. S. Major, N.P.

Plate I.

attached to Exhibit A of the Bill
No 24307 page 5

Fig 1.

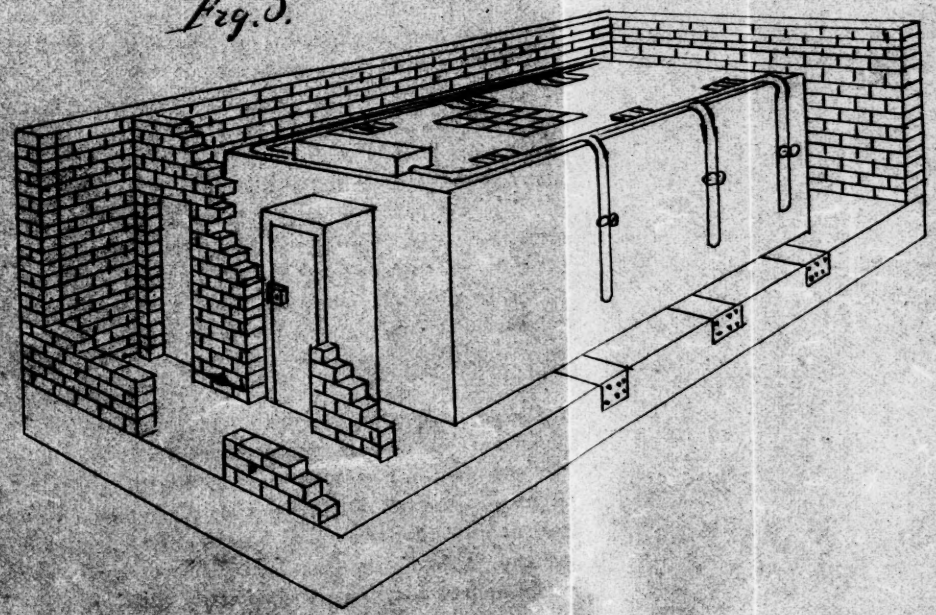


No 1.

Plate II.

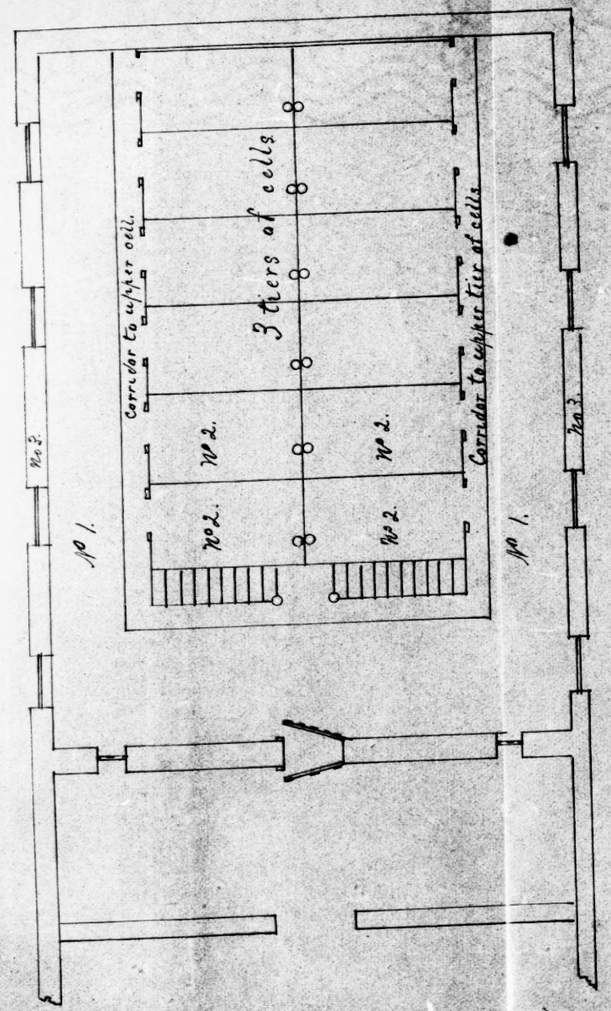
attached to Exhibit A of the bill
No 24307 page 5

Fig. 3.



No 3.

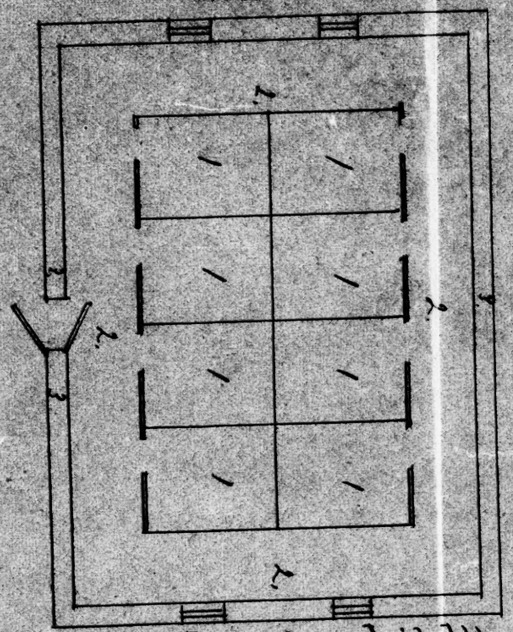
Exhibit "O" Plate III.



Plan of New Albany Jail.

Plate IV

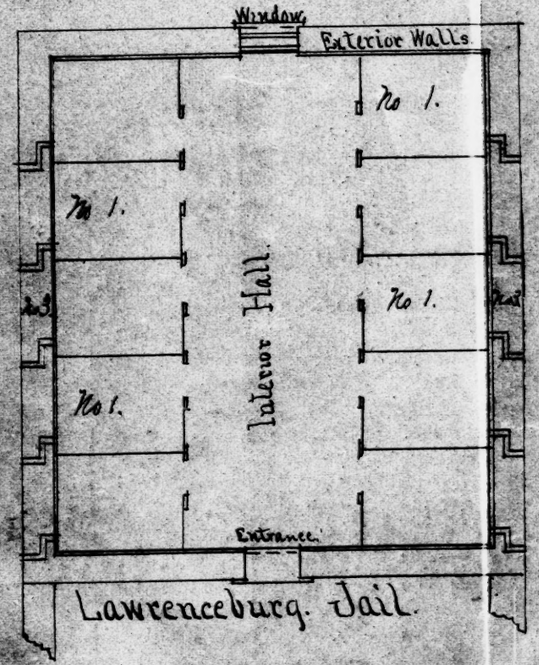
Exhibit "U"



Plan of Princeton Jail III.

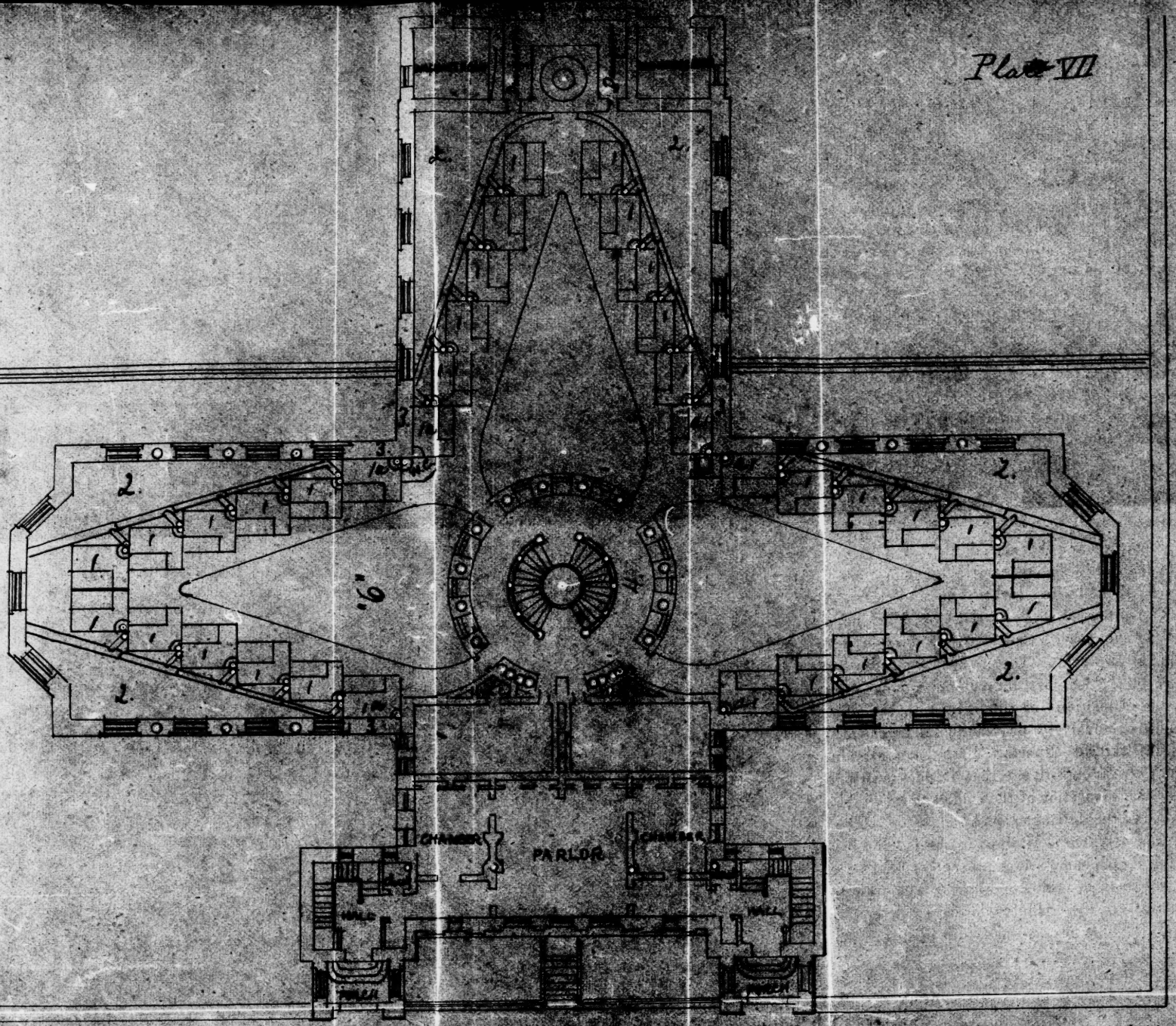
Plate V

Exhibit P.



Lawrenceburg. Jail.

Plate VII



HAMILTON COUNTY, JAIL. PLAN PRINCIPAL STORY

Isaiah Rogers. Architect

Plate XIII

Attached to Exhibit B. of the bill

No 26.500

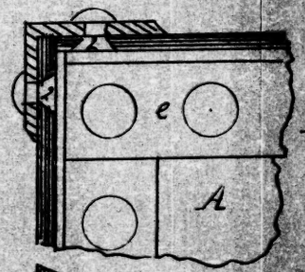


Fig. 4.

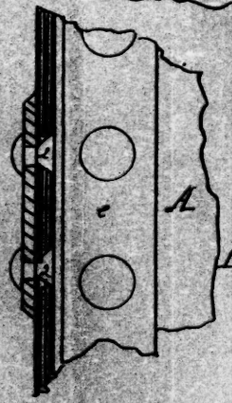
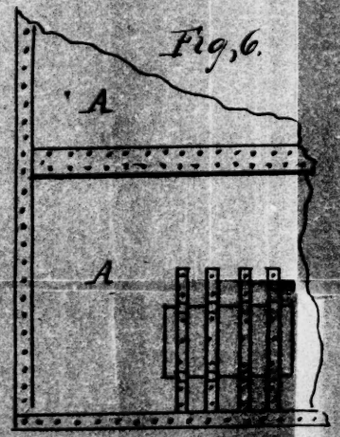


Fig. 5.

Fig. 3.

Fig. 6.



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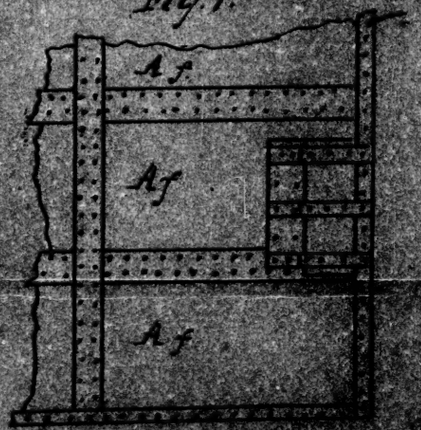


No 6

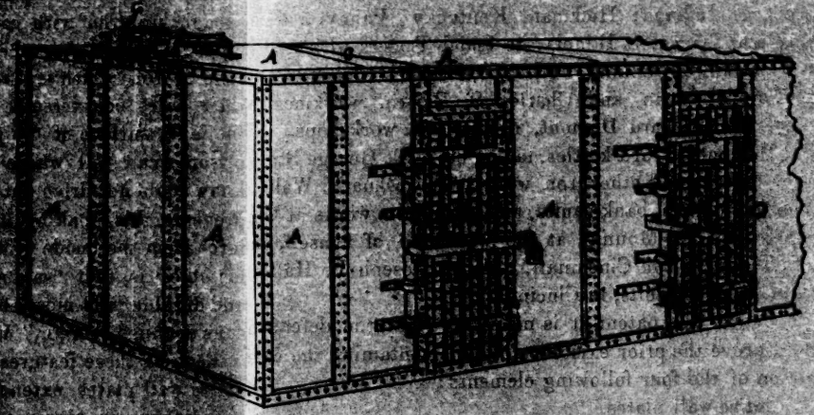
Plate IX.

Attached to Exhibit B of the bill

No. 26500.

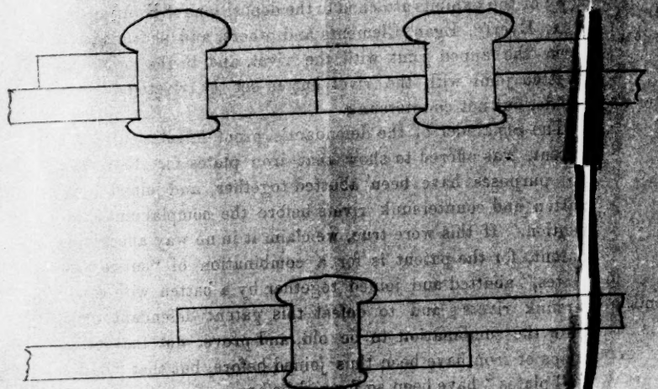
(page 5 original record)

Fig. 2.



No 5

Plate



attached to Exhibit "C" of the Bill

(Copy of original sketch)

Fig 1

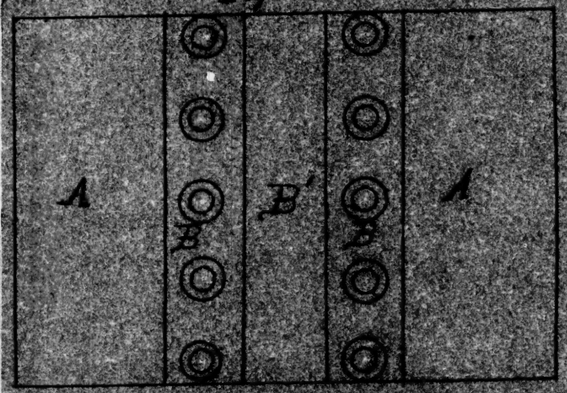
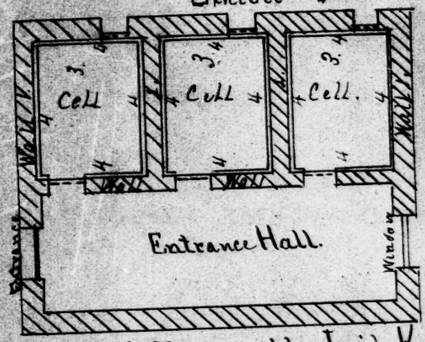


Fig 2

No 1

Exhibit V



Plan of Falmouth Jail Ky

"See page 17"

Plate XII.

Attached to Exhibit D of the Bill

No 29282

Fig. 3.

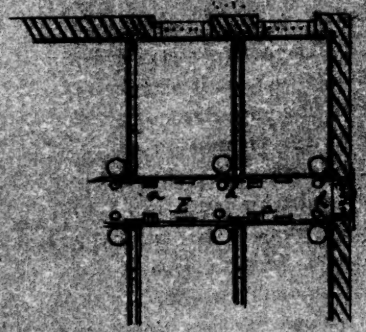


Fig. 2.

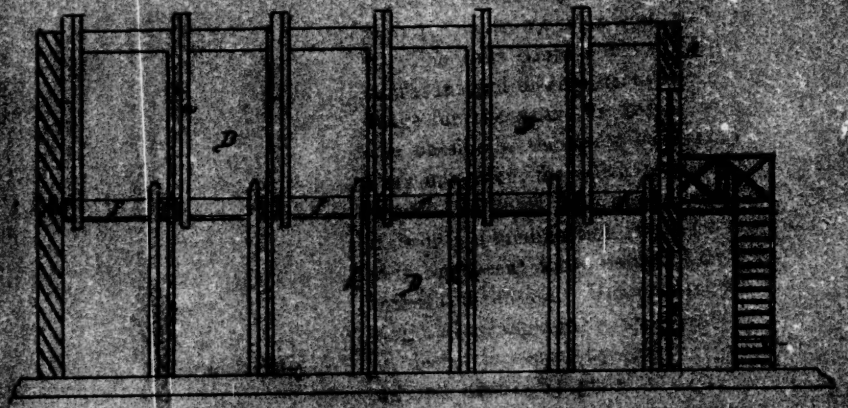
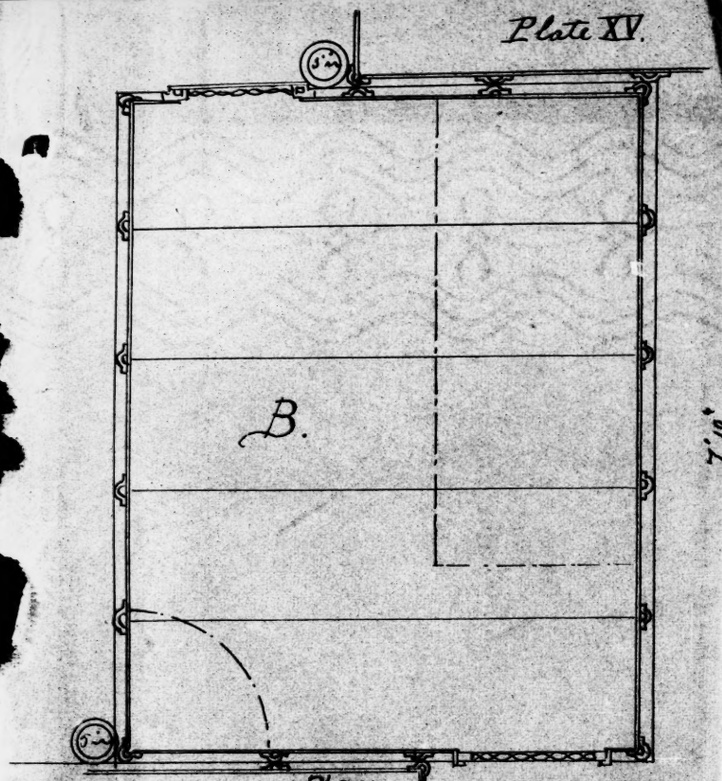
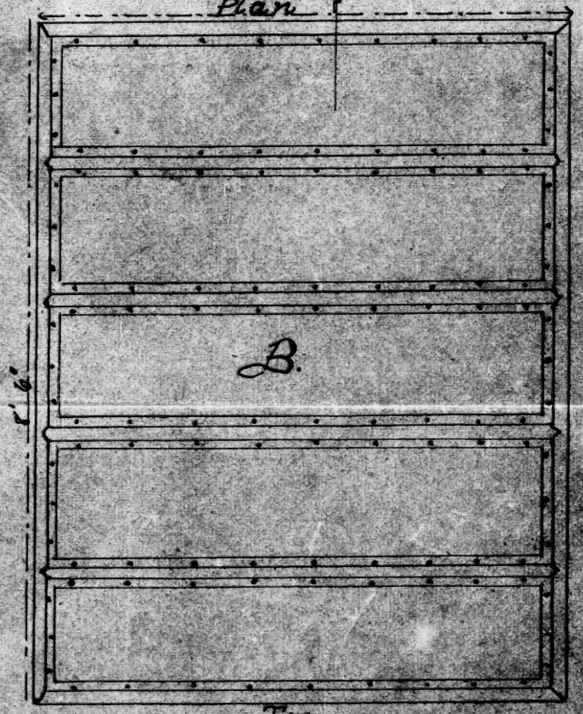


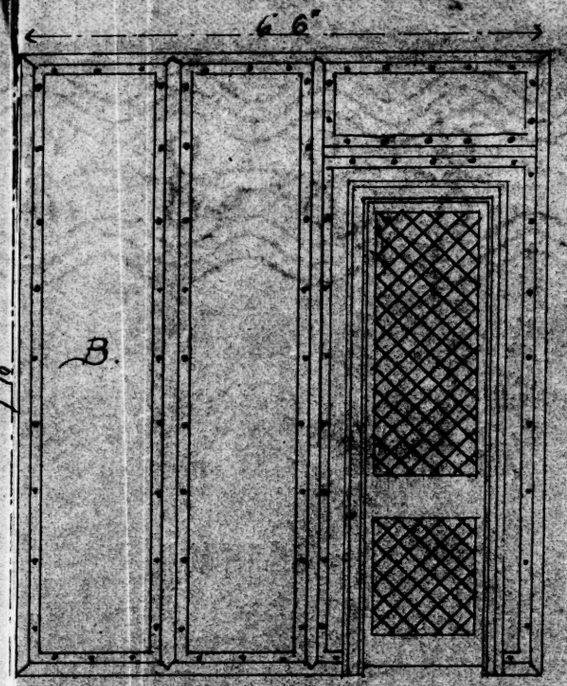
Plate XV.



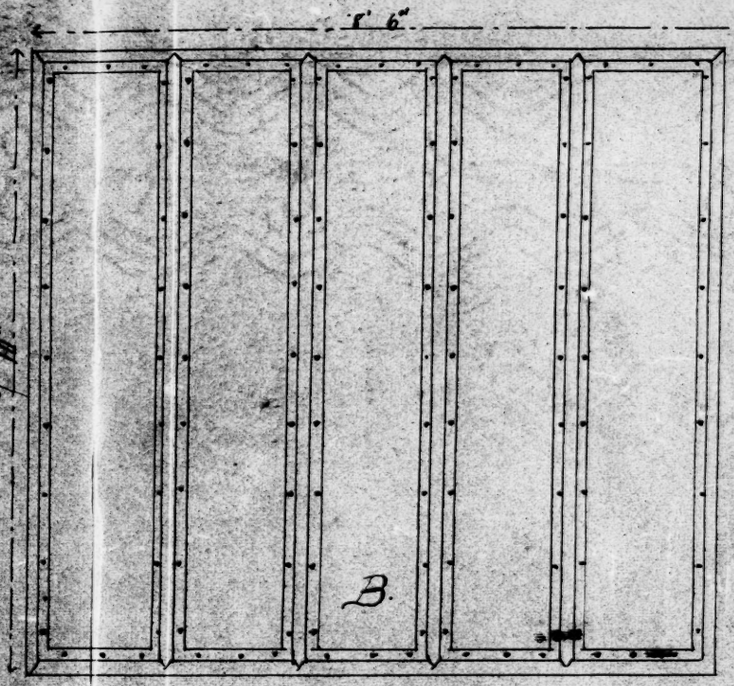
Plan



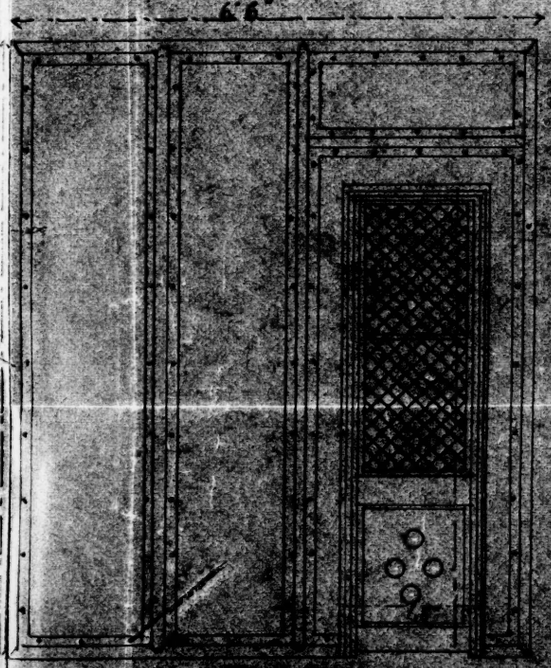
Top.



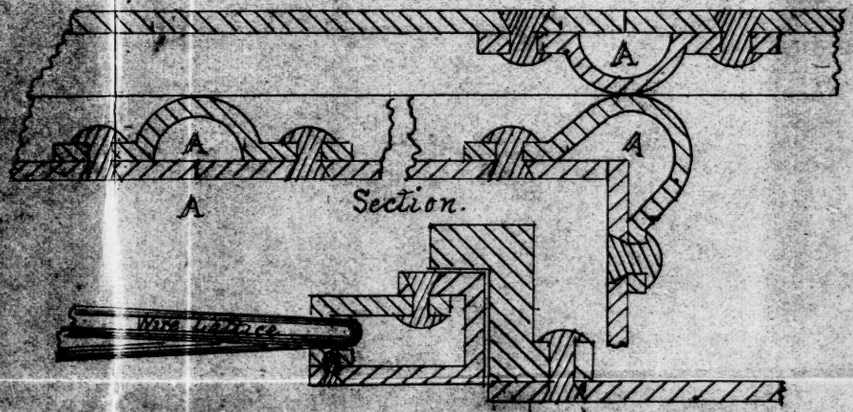
Front Elevation



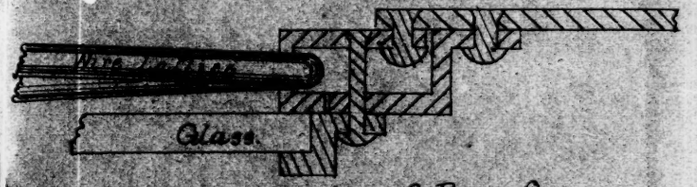
Side Elevation.



Front Elevation



Section of Door & Casing



Section of Rear Opening.

DETAIL OF IRON CELL. Jacob Rogers Architect

In the United States Supreme Court.

ACTION NO. 101.

CHARLES F. STANSBURY PET. vs. THE UNITED STATES.

CLAIMANT'S BRIEF.

The case at Bar is in its nature a Bill in Equity; and it finds, that on this contract (of Agency) there is a large balance in favor of the Petitioner, for meritorious labor, as yet unpaid.

The contract in question is a contract of the Government of the United States, in writing, sanctioned by its *own* seal.

Its seal was set thereon by a Government officer, having power to place it there.

9 Stat. p. 395, 396. Sec. 11. March 3, 1849.
Gratiot v. U. States, 15 Peters, 336, 370, 371, 378.

If that Government Officer mistook his powers, in this regard, it was a mistake of the Government.

Its *Officer* may have been ignorant of the law; — he may have made a mere mistake; — or he may have placed its seal there improperly, to make gains for his Government, — or for other purposes of fraud. But Petitioner submits that the Government cannot now, by any principle of law go behind its seal, to avoid payment of the just consideration which that seal induced.

U. States vs. Mc Daniel, 7 *Pet.* 10, 16.

In this case the Court say—"*It would be a novel principle* to refuse payment to the subordinates of a Department, because their Chief, under whose direction they have faithfully served the public, *had mistaken his powers*, and had given an erroneous construction of the law."

Deut. 25 : 4. Ibid Chap. 24 : 14, 15.

Defendants deny *this;* — and interpose the Statute of August 23, 1842, Sec. 2, (5 Stat. 510) as a bar to Petitioner's claim. It reads thus:

"No Officer, in any branch of the public service, or any other person whose salary, pay, or emoluments, is or are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or any other service or duty whatever, unless the same shall be authorised by law, and the *appropriation therefor explicitly set forth*, that it is for such additional pay, extra allowance, or compensation."

But Petitioner insists that if the above Act had, at its passage, any reference to Clerks in the Departments, it has been repealed so far as it related to them, by subsequent enactments.

Petitioner having been commissioned to perform a distinct Agency in a foreign country, such agency is to be regarded as inconsistent with a Clerkship here. His Clerkship for the time was *in fact* suspended, during his 9 months absence; although the $100 per month was not withheld from his family during that period.

It is a fair presumption of law that the Secretary of the Interior in creating an Agency to perform the service in question, *acted legally*. It would not become the Government to appoint and endorse Mr. Stuart as Secretary of the Interior, as worthy of public trust; and then turn around and repudiate his contracts, and deprive innocent individuals of reasonable pay for services performed for the Government; and that too in violation of a contract in form the strongest known to the law.

~~Note~~ Mr Ruddle on a similar agency was paid by the Govt. from a subsequent appropriation 10 Stat at L. p. 660

The value of claimant's services appears in the proof.

Hon. Geo. C. Whiting, a witness of long experience in the Departments, who well knows what such services were worth, testifies that claimant's services, during his Agency, were reasonably worth $5000 per year; which for 17 months would amount to $7082.

Plaintiff in his Petition claims to recover $6,000. He concedes that the salary of $100 per month was not withheld from him — and that the $900 received here during his 9 months absence in England, may properly be deducted from the amount, as proved to be a reasonable compensation, which amount he claims to recover under the law and rules of Equity.

He submits, that said salary of $100 per month for the 8 months after his return home, *ought not to be deducted*, as that would not be more than a fair offset for his *expenses* while making up the Report, which have not been brought into the account, and which the Government promised to pay, as well as a reasonable compensation for his services.

See Commission.

Claimant most respectfully submits that the Government's *contract* with him, the *time* actually employed by him as Agent in its service, as well as the *value* of his services, are by the evidence in the case clearly proved — and that under the evidence he is justly entitled to recover, after allowing all just credits and offsets, the full sum of $6,000 with lawful interest thereon.

ROBERT B. CAVERLY,
Of Counsel for Claimant.

In the United States Supreme Court.

ACTION NO. 101.

CHARLES F. STANSBURY PET. vs. THE UNITED STATES.

CLAIMANT'S BRIEF.

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U. States v. Mc Daniel, 7 *Pet.* 10, 16.

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3 Abbotts N. Dig. p. 360 sec 155-158

But Petitioner insists that if the above Act had, at its passage, any reference to Clerks in the Departments, it has been repealed so far as it related to them, by subsequent enactments.

Petitioner having been commissioned to perform a distinct Agency in a foreign country, such agency is to be regarded as inconsistent with a Clerkship here. His Clerkship for the time was *in fact* suspended, during his 9 months absence; although the $100 per month was not withheld from his family during that period.

It is a fair presumption of law that the Secretary of the Interior in creating an Agency to perform the service in question, *acted legally*. It would not become the Government to appoint and endorse Mr. Stuart as Secretary of the Interior, as worthy of public trust; and then turn around and repudiate his contracts, and deprive innocent individuals of reasonable pay for services performed for the Government; and that too in violation of a contract in form the strongest known to the law.

Note Mr Ruddle on a similar agency was paid by the Govt. from a subsequent appropriation 10 Stat at L. p. 660

The value of claimant's services appears in the proof.

Hon. Geo. C. Whiting, a witness of long experience in the Departments, who well knows what such services were worth, testifies that claimant's services, during his Agency, were reasonably worth $5000 per year; which for 17 months would amount to $7082.

Plaintiff in his Petition claims to recover $6,000. He concedes that the salary of $100 per month was not withheld from him — and that the $900 received here during his 9 months absence in England, may properly be deducted from the amount, as proved to be a reasonable compensation, which amount he claims to recover under the law and rules of Equity.

He submits, that said salary of $100 per month for the 8 months after his return home, *ought not to be deducted*, as that would not be more than a fair offset for his *expenses* while making up the Report, which have not been brought into the account, and which the Government promised to pay, as well as a reasonable compensation for his services.

See Commission.

Claimant most respectfully submits that the Government's *contract* with him, the *time* actually employed by him as Agent in its service, as well as the *value* of his services, are by the evidence in the case clearly proved — and that under the evidence he is justly entitled to recover, after allowing all just credits and offsets, the full sum of $6,000 with lawful interest thereon.

ROBERT B. CAVERLY,
Of Counsel for Claimant.

It was repealed as to them by the Act of August 26, 1842, Seotion 12, [5 Statutes 525.] It reads thus:

"No allowance or compensation shall be made to any Clerk or other Officer, by reason of the discharge of duties which belong *to any other Clerk* in the same or other Department; and no allowance or compensation shall be made for any *extra* services whatever, which any Clerk or other Officer may be required to perform."

This Act enacts an independent Rule for Clerks or other Officers in the Departments. It refuses pay to them for doing the duties of *other* Clerks or Officers, and refuses pay to them for *extra* services of any kind.

(*a*) By this Act the former Act is repealed as to Clerks, because it prescribes a Rule involving the same subject matter.

Bartlet and al. v- King, 12 Mass. 545.
Ellis v. Paige, 1 Pick. 45.

(*b*) While this Act declares that a Clerk shall have no pay for services done in the place of *another*, and no *extra* allowance whatever,—it also, in its legitimate effect, *declares* that a Clerk *may have pay* on a special contract in a distinct service foreign to *clerkships* and *extra* allowances.

(*c*) These Statutes, we submit, were never intended to prevent the holding of two distinct offices at the same time,—the one entirely foreign to the other. And it has been so adjudged.

Devereau's Rep. 42.
Converse v. U. States, 21 Howard, 470, 471.
5 Opin. Crittenden Att'y Gen. p. 765, 766.
6 " Cushing Att'y Gen. p. 83, 84.
8 " Cushing Att'y Gen. p. 325.
And cases there cited.
9 Stat. p. 100. Aug. 31, 1852.

The Statute of Aug. 23, 1842, relied upon as a bar to Petitioner's recovery, is in derogation of private rights; and is to be construed strictly.

U. States v. The Hunter, 10 Pet. C. C. Rep. 10.
Smith v. Spooner, 3 Pick. 230.
Sprague v. Birdsall, 2 Cow. 419.
Sewall v. Jones, 9 Pick. 414, 514.

As against an equitable, meritorious claim, it can have no operation by implication.

Both of said Acts appear to have been repealed by subsequent Acts [See Act 1852, 10 Stat. p. 100, Sec. 18,] [and Act 1853, 10 Stat. p. 211, Sec. 3.]

If then the Acts of 1842 have been repealed, even since the contract,—then we submit that such repeal is by legal construction to have a retro-active operation, and the Petitioner would be allowed to recover by the rules of common law and equity, the same as if such repealed Statute had never existed.

The Act of Aug. 31, 1852, (9 Stat. p. 100,) reads thus:

"No person hereafter who holds, or shall hold, any office under the Government of the United States, whose salary or annual compensation shall amount to the sum of $2500, shall receive compensation for discharging the duties of any other office."

This Act proves what construction Congress gave to the former Acts in question, to wit: that up to that time Clerks could hold two distinct offices at the same time, and take pay accordingly;—Hence this act forbids it, if *the Clerk* or officer is already receiving $2500;— *but not otherwise.*

No. 101.

Stansbury v. U. States.

PLAINTIFF'S BRIEF.

T. 45. N. R. 7 E. of the 5th Pl. M.

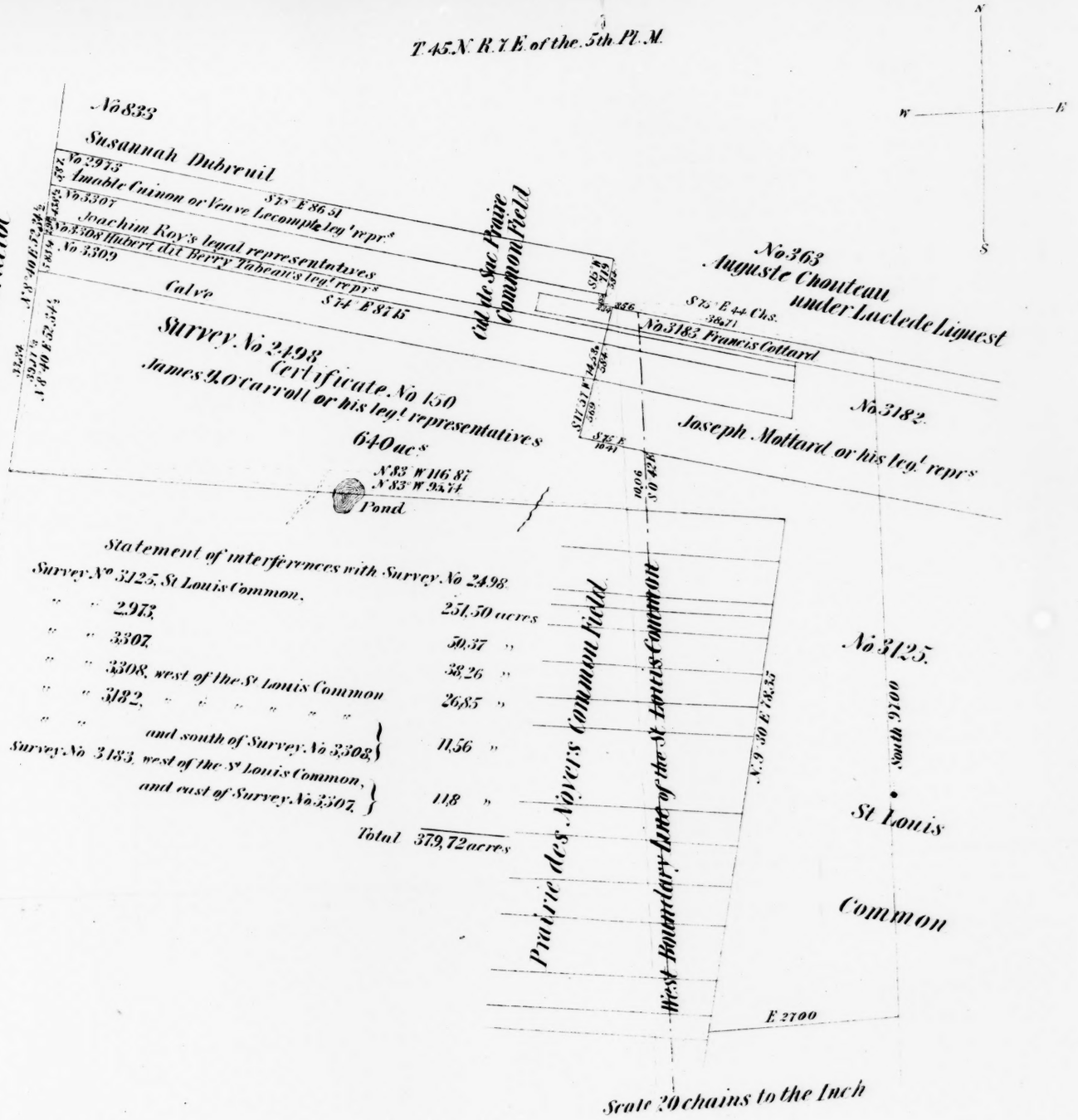
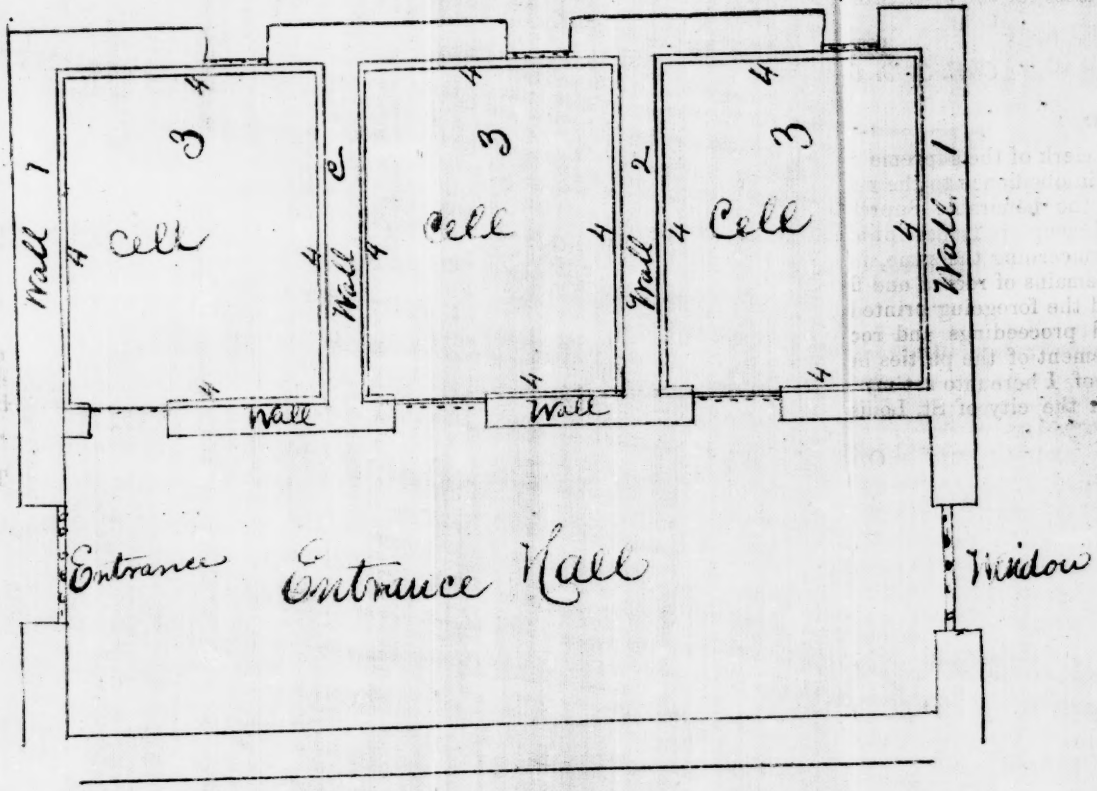

No 833
Susannah Dubreuil
No 2973
Amable Guimon or Veuve Lecompte leg'l repr's
No 3307
Joachim Roy's legal representatives
No 3308 Hubert dit Berry Labeau's leg'l repr's
No 3309
No 2037
Charles Gratiot
Survey No 2498
Certificate No 150
James O'Carroll or his leg'l representatives
640 acs
Old the Sac Praire Common Field
No 363
Auguste Chouteau
under Laclede Liguest
No 3183 Francis Cottard
No 3182
Joseph Mottard or his leg'l repr's
Pond
Statement of interferrences with Survey No 2498
Survey No 3125 St Louis Common. 251.50 acres
" " 2973 50.37 "
" " 3307 38.26 "
" " 3308 west of the St Louis Common 26.85 "
" " 3182 " " " " " " 11.56 "
" " and south of Survey No 3308 } 11.18 "
Survey No 3183 west of the St Louis Common,
and east of Survey No 3307
Total 379.72 acres
Prairie des Noyers Common field
West Boundary Line of the St Louis Common
No 3125
South 2700
St Louis
Common
E 2700
Scale 20 chains to the Inch
No 247
Page 20

Exhibit V

Attached to Deposition of Jas. Whitehead Page 172.



Plan of Jacobs vs Baker

Falmouth Jail Key

A

No. 100

52025.3

Edwin Cox
Notary Public

Exhibit B. J.E.

Exhibit C. J.E.

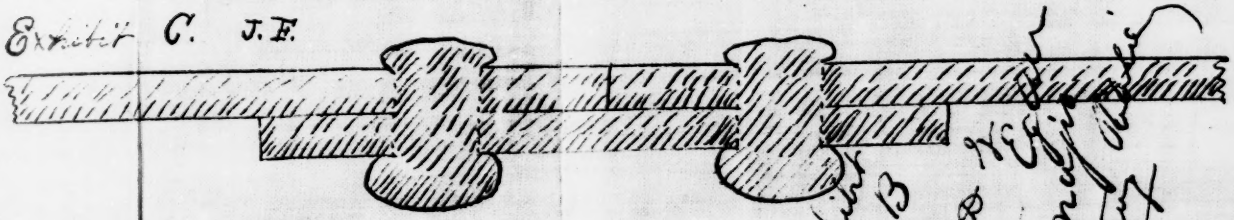


Exhibit
Page 75. ite B.
Rebuttal
Clerk
Eff
Mfg
Mfg

No 100 Jacobs vs Baker.

B

No 100 Jacobs
vs
Baker

C.

Plan of Helena Jail

A R

Exhibit R.

Edwin Coy
Notary Public

attached to Deposition of Michael Clements
page 152.

№ 100 { Jacobs vs Baker D

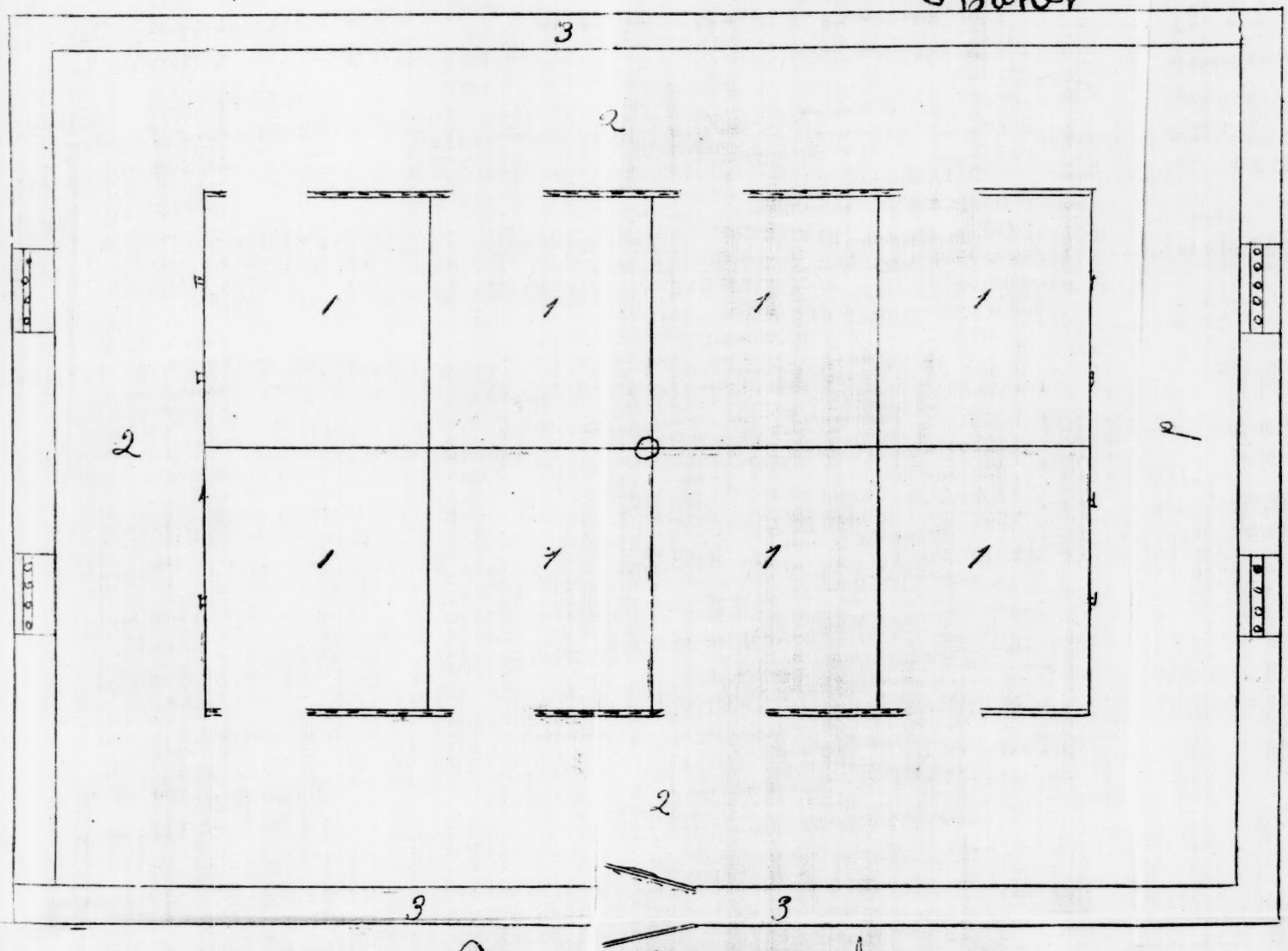
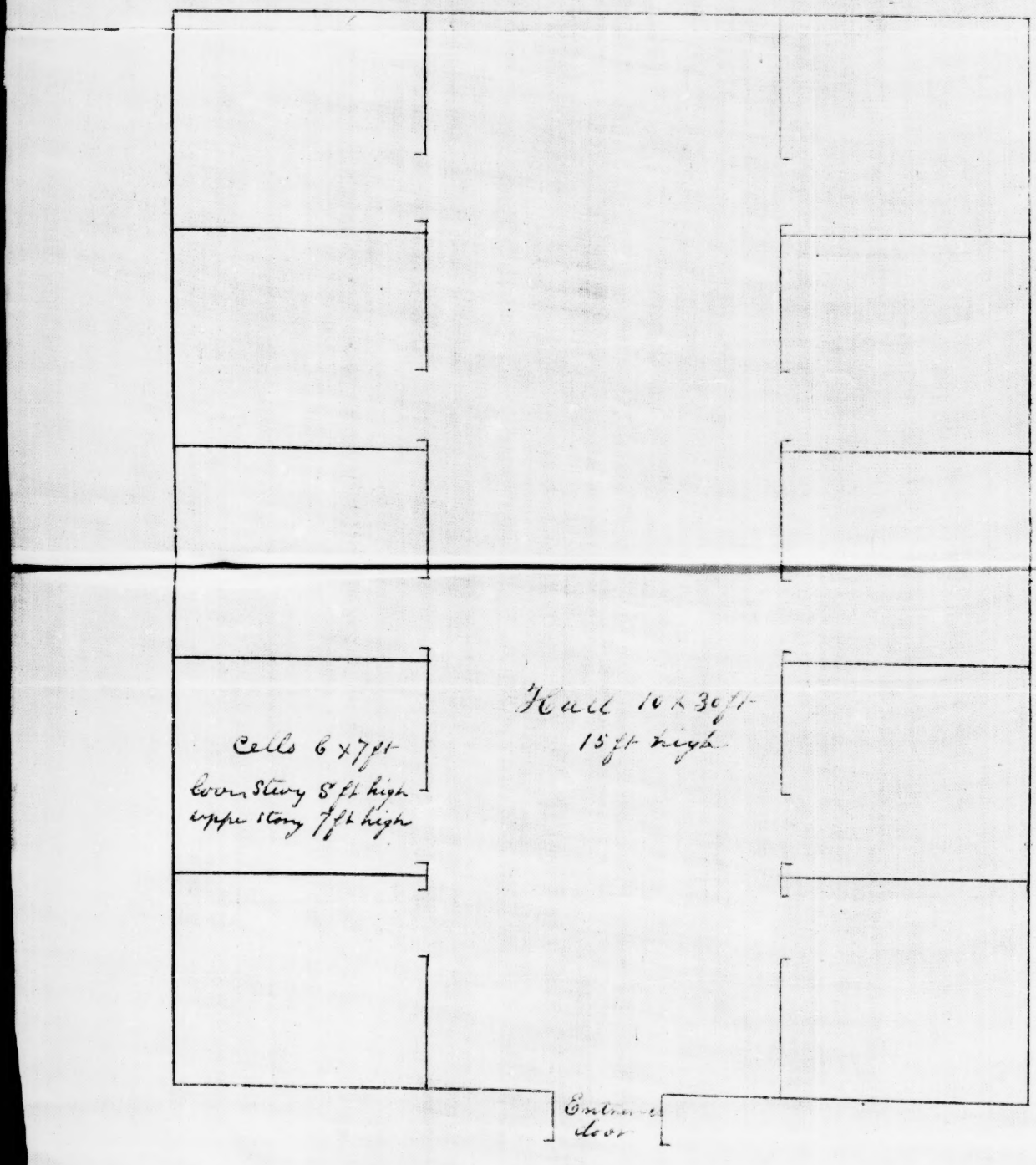


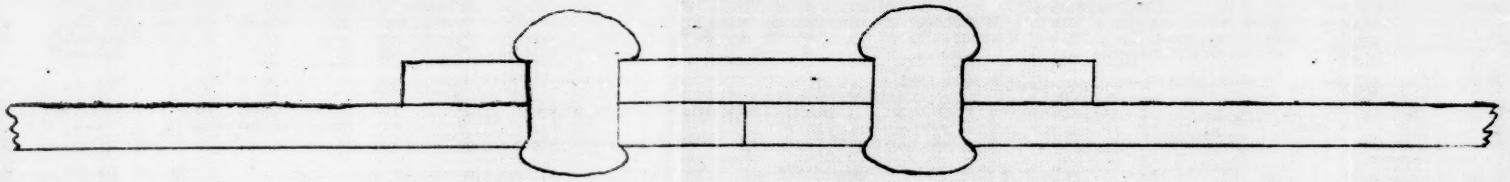
Exhibit "LL" Edwin Cox
Attached to Deposition of C. S. Rawlins Notary Public
Page 166

Plan of Princeton Jail Ill. in 1852 or 1853 E.

Exhibit A J.E.

Exhibit A Annexed to Answer Sworn to May 7th
Notary Public





E

Drawing E referred to by the
witness Michael Beyerley in
the deposition here to attached Page 122
Marten Cosaire
Notary Public.

F

No 100 Spacets
vs.
Baker

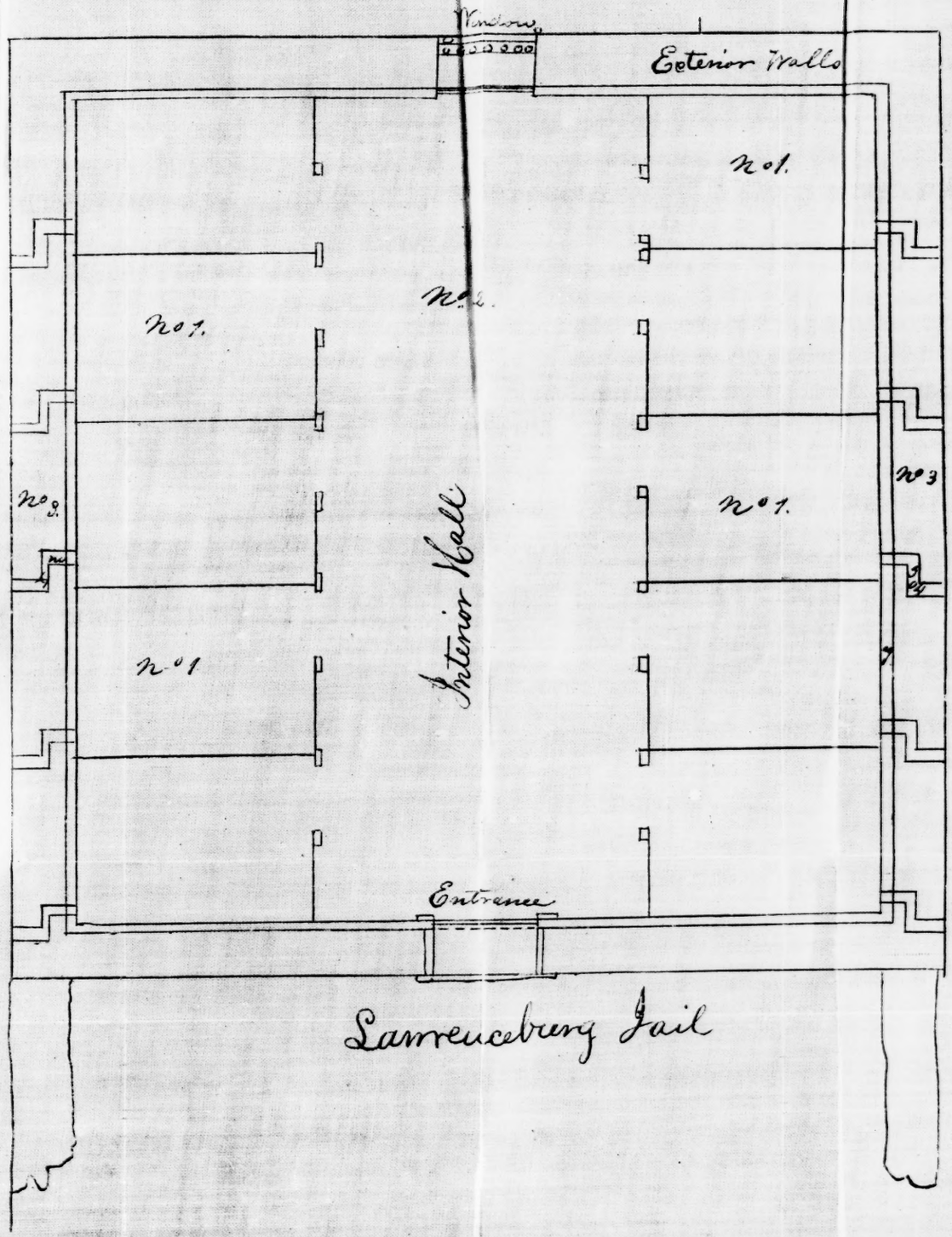
No 100 Jacobs vs. Baker

G

Attached to Deposition of Michael Clements
Page 150.

Exhibit P

Edwin Cox
Notary Public



No 100 Jacobs vs Baker

H

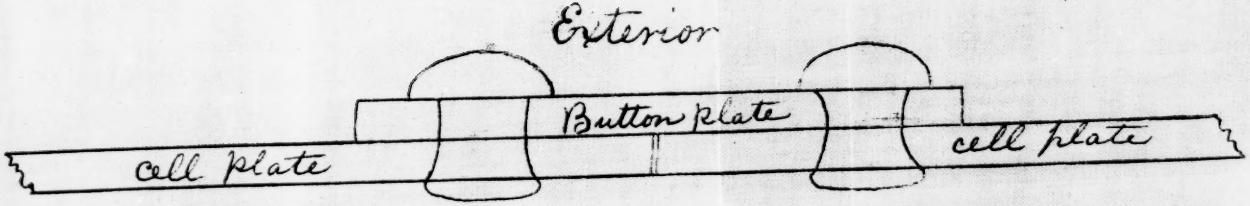


Exhibit N. Attached to Deposition of Michael Clements
Page 149

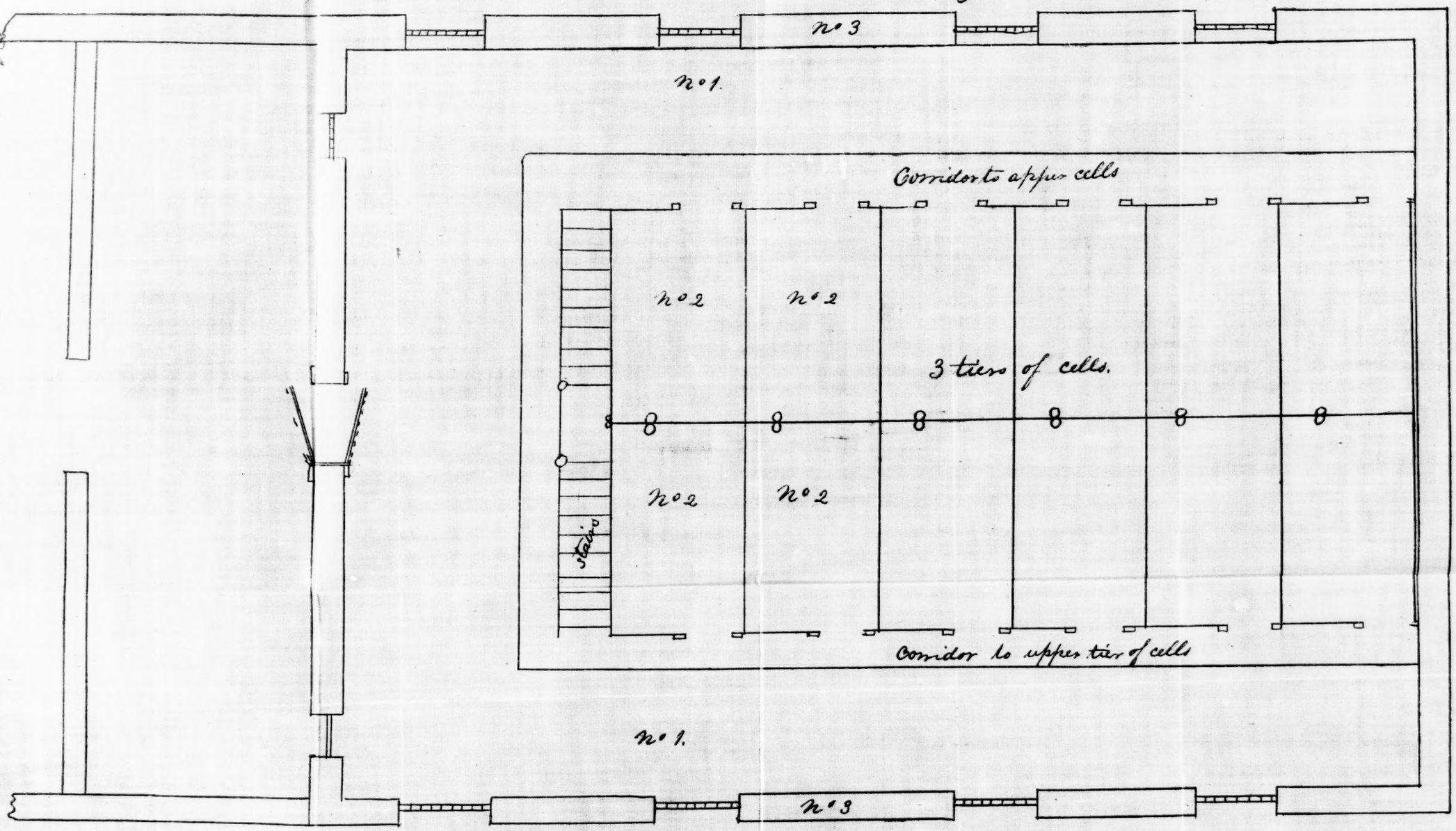
Edwin Cox
Notary Public

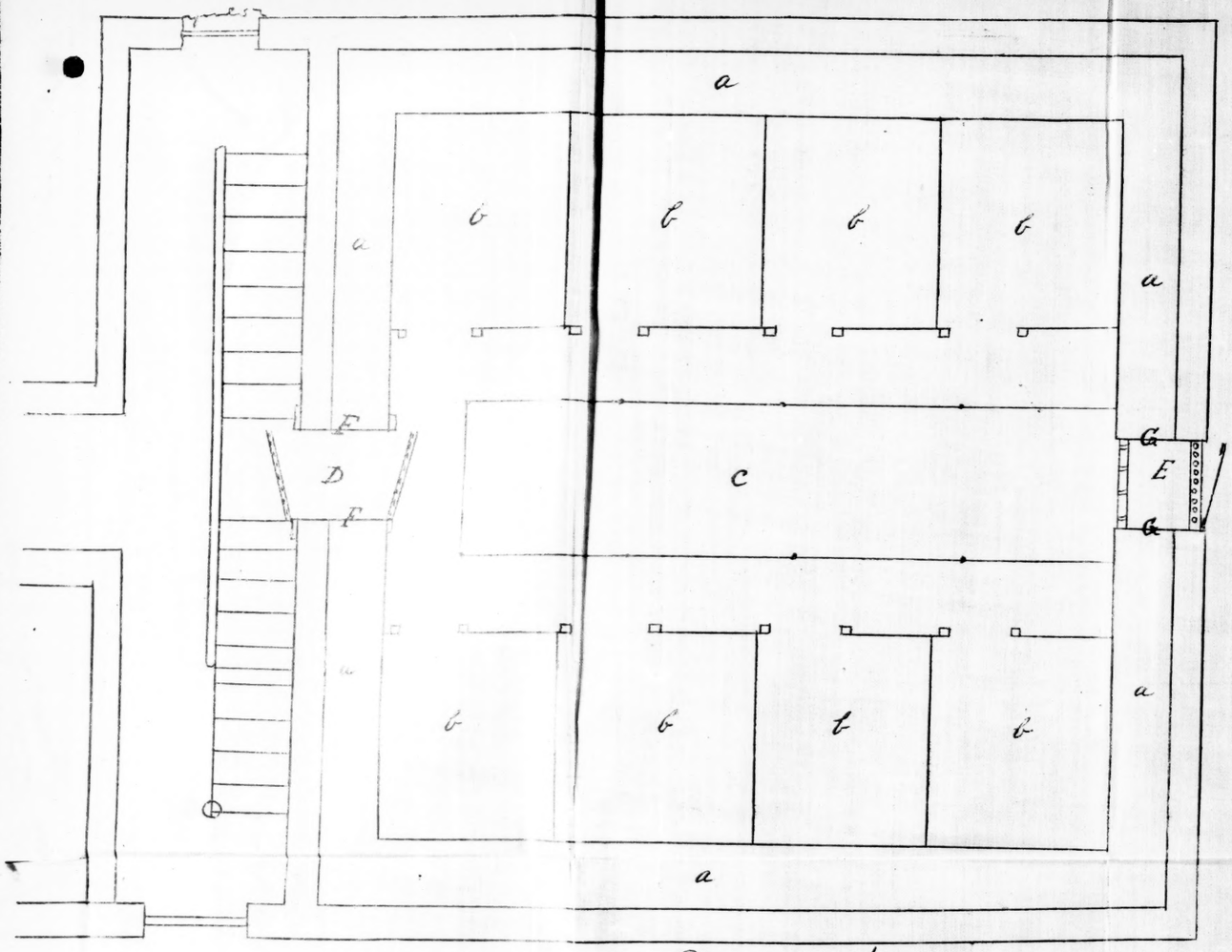
Exhibit O attached to Deposition of Michael Clements. Page 149.
Edwin Cox
Notary Public

No 100 Jacobs
vs
Baker

I

Plan of Albany Jail



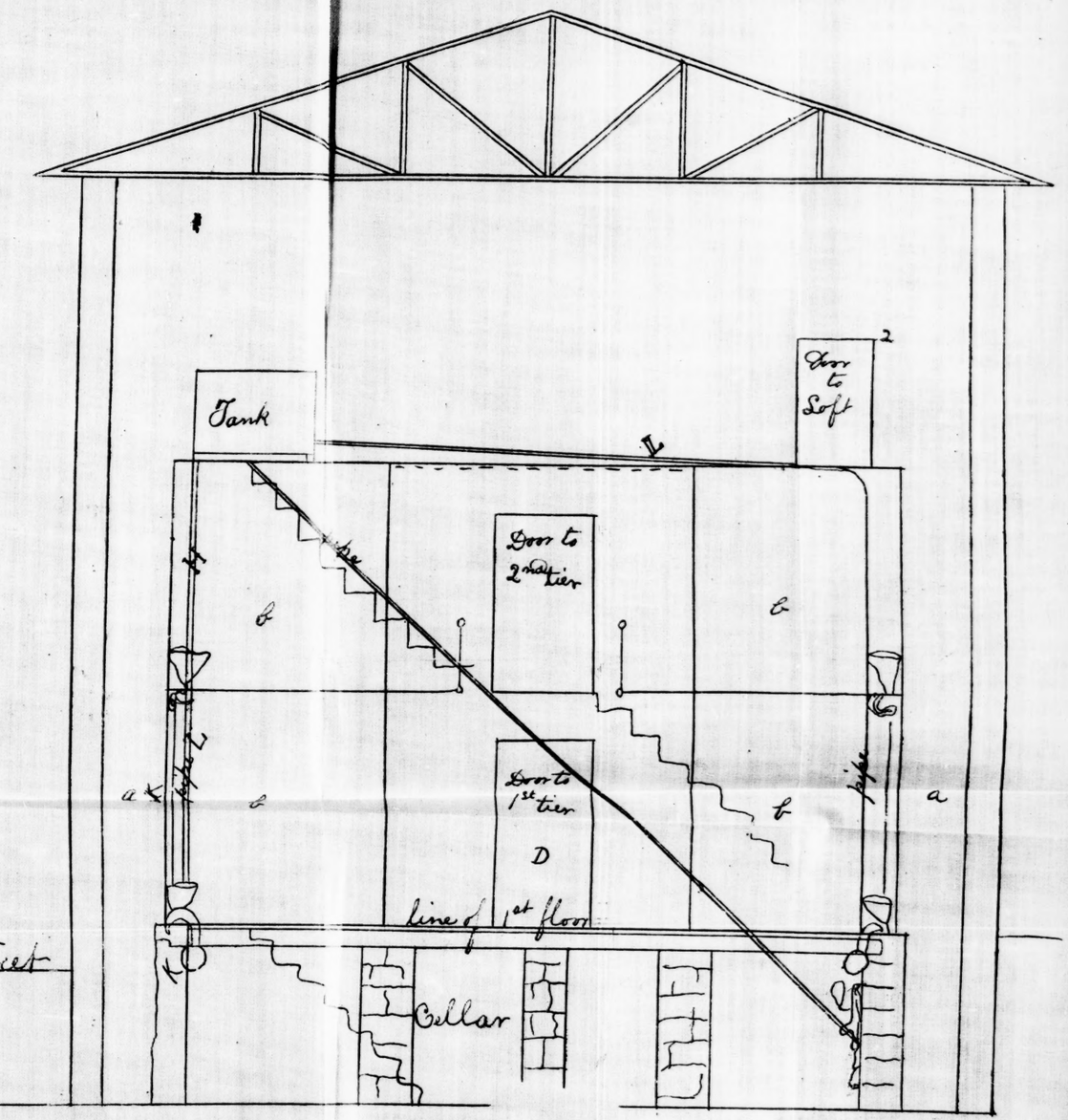


Plan of Portsmouth Jail

Exhibit T

Attached to Deposition of S. Dierling Page 161.

No 100 Sussex Co. N.J. Water K



Elevation of Portsmouth Jail

Edwin Cox

Notary Public

Exhibit A. J.N.N.

I Perry M. Green Notary Public within and for the County of Shelby, & State of Indiana certify that the exhibit-"A" J.N.N. is the exhibit referred to by the witnesses mentioned and who have Deposited & are known to me to be attached Veteran and Notarial Seal Perry M. Green N.P.

Exhibit B. J.N.N.

I Perry M. Green Notary Public within and for the County of Shelby, & State of Indiana certify that the exhibit-"B" J.N.N. is the exhibit referred to by the witnesses mentioned & who have Deposited & are known to me to be attached Veteran my hand and Seal Perry M. Green Notary Public

Cells in Shelby County Jail

Plan of cells

Plan 8 feet wide

Plan 8 feet wide

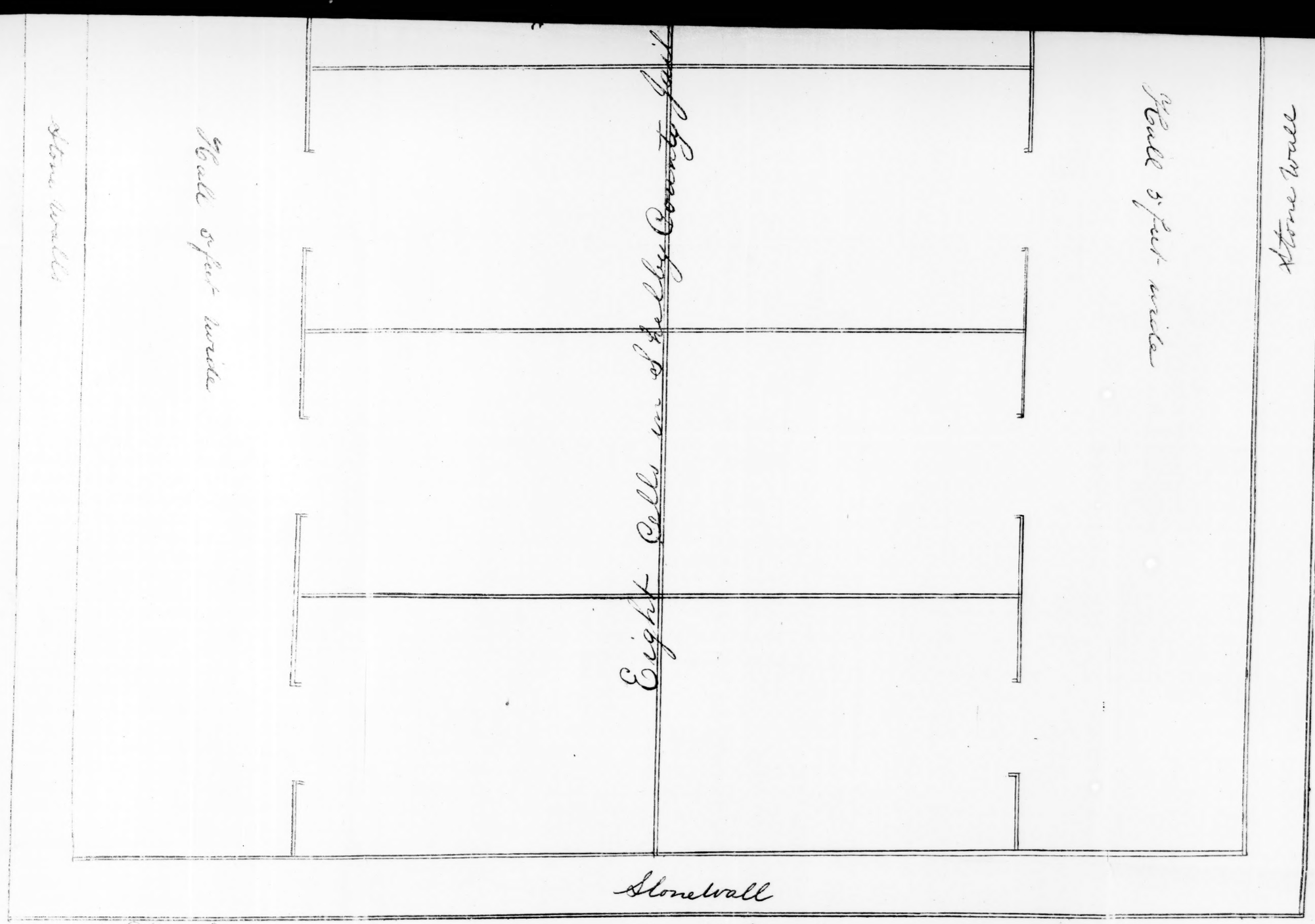
Plan 8 feet wide

Stone Wall

Wall C.

Wall C

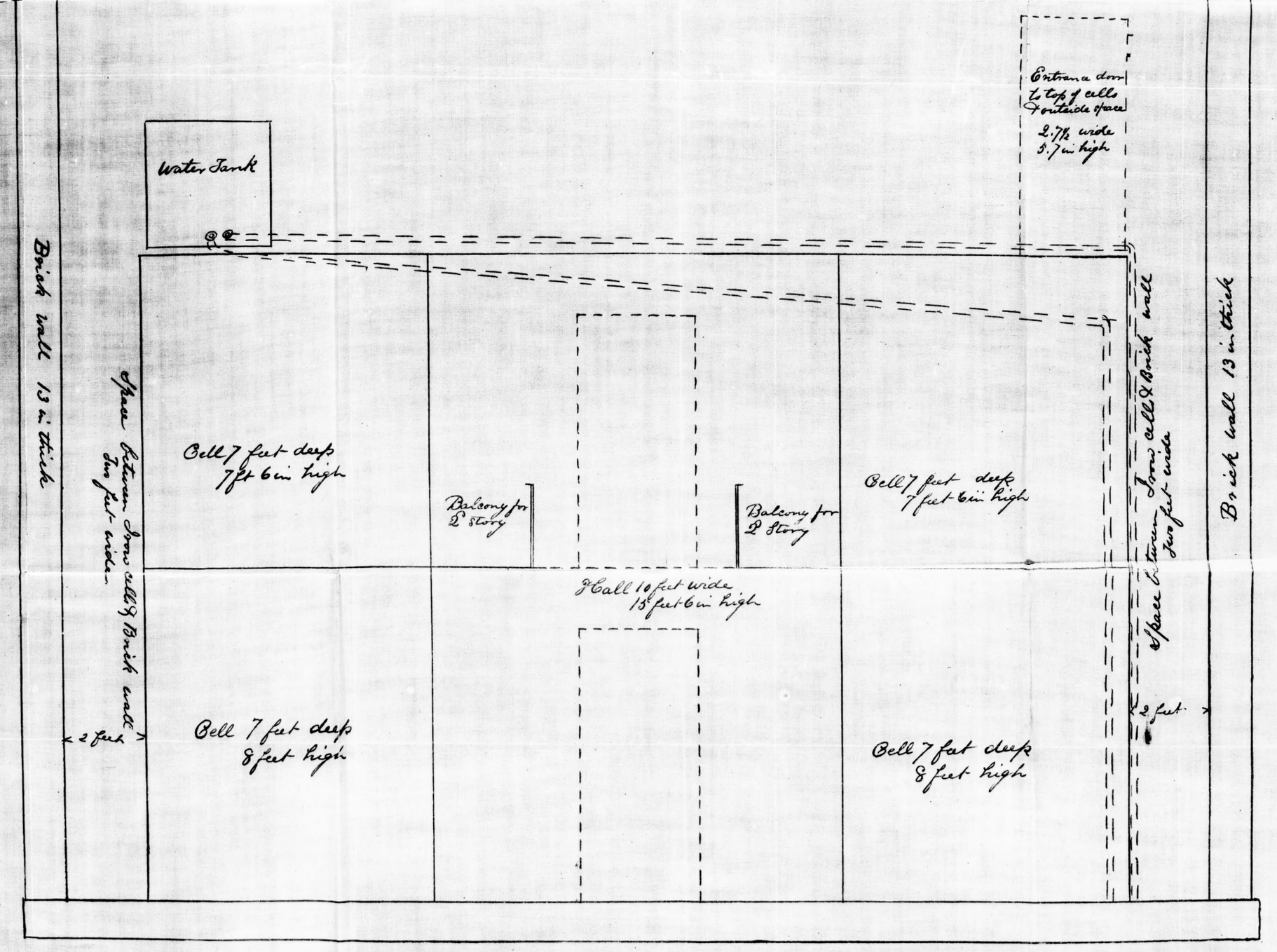
Plan of cells
Accurate
6 X 8 feet



No 100 Jacobs & Baker I

Ground Plan of Shelby County Jail Ind.
Scale ½ inch to the foot.

Drawing B referred to by in the deposition hereto attached by the witnesses Michael Beyerly and John L Ward, p.p. 122, 126.
Martin Crain
Notary Public


Entrance door to top of cells Outside of area 2.7½ wide 5.7 in high
Water Tank
Brick wall 13 in thick
Space between Iron cells & Brick wall Two feet wide
Cell 7 feet deep 7 ft 6 in high
Balcony for 2 Story
Balcony for 2 Story
Hall 10 feet wide 15 feet 6 in high
Cell 7 feet deep 7 feet 6 in high
Iron cells & Brick wall
Space between Two feet wide
Brick wall 13 in thick
2 feet
Cell 7 feet deep 8 feet high
Cell 7 feet deep 8 feet high
2 feet

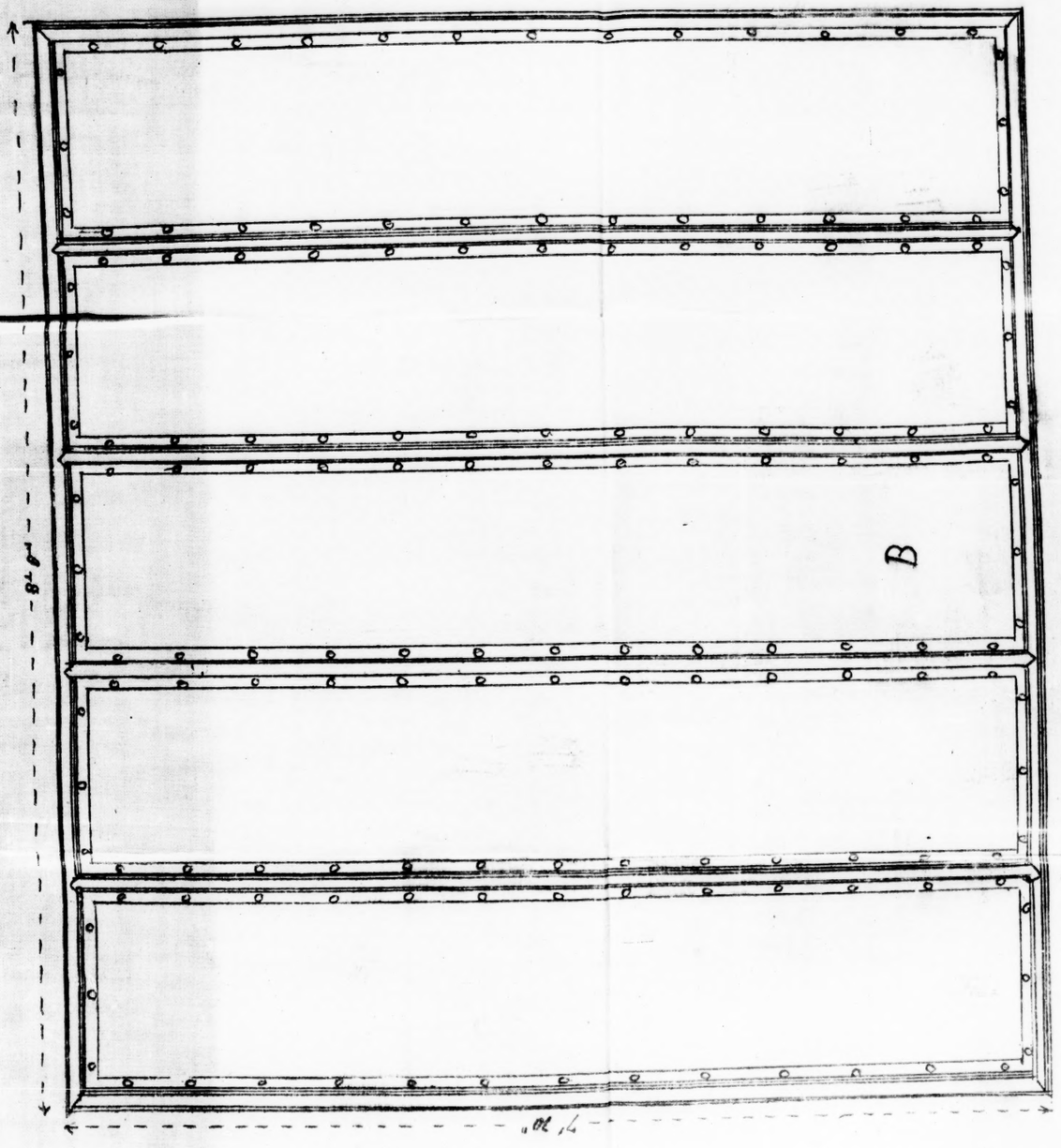
"B"

Plan of Section of Jail in Portsmouth Scioto County Ohio
Scale ½ inch to the foot

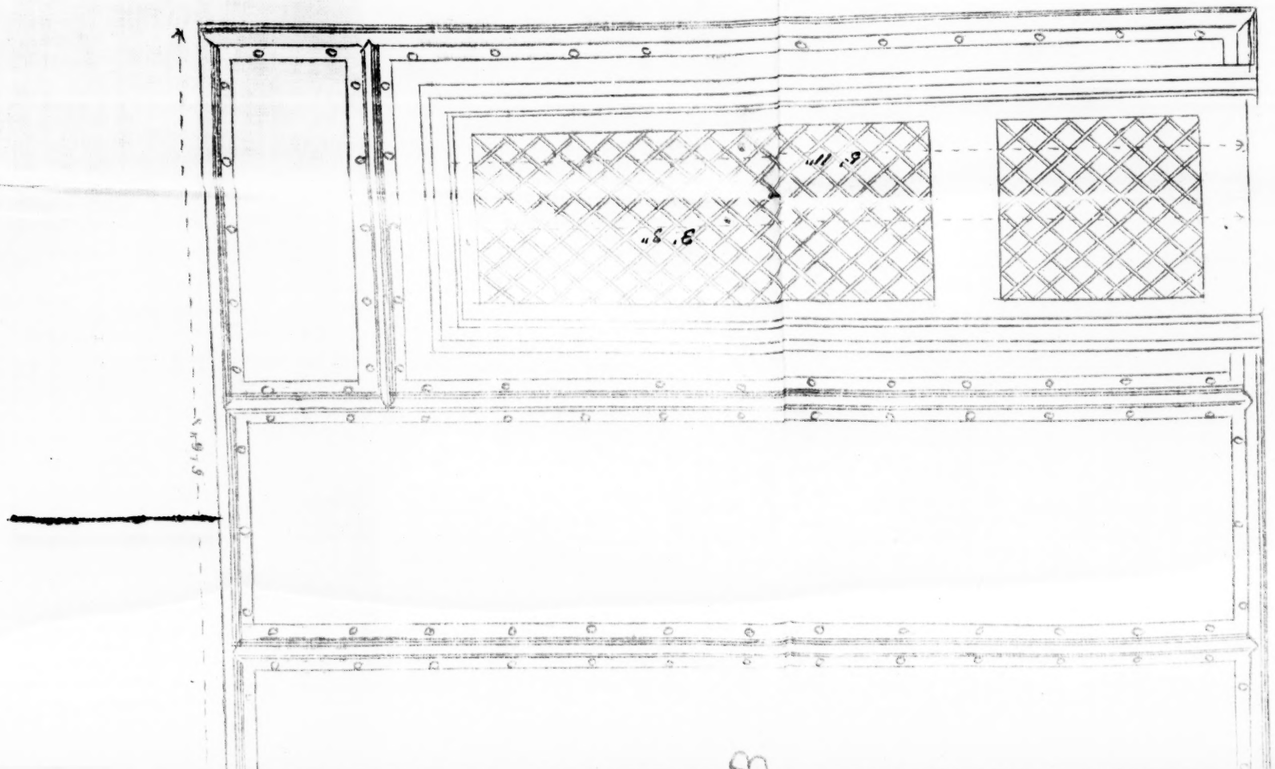
No 100 { Jacobs vs Baker M

1/2" = 1.00 { Glaces as Boards

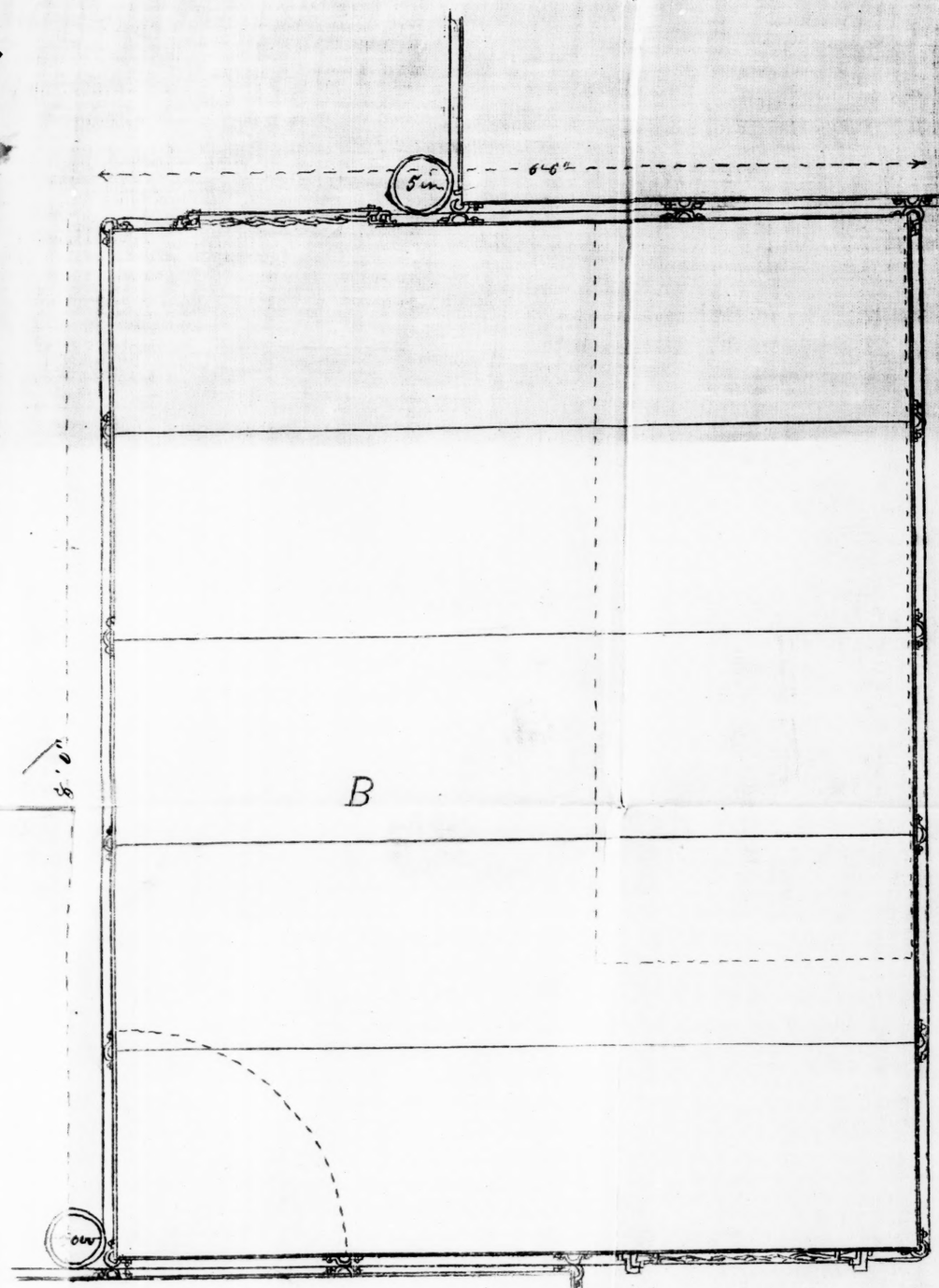
N.

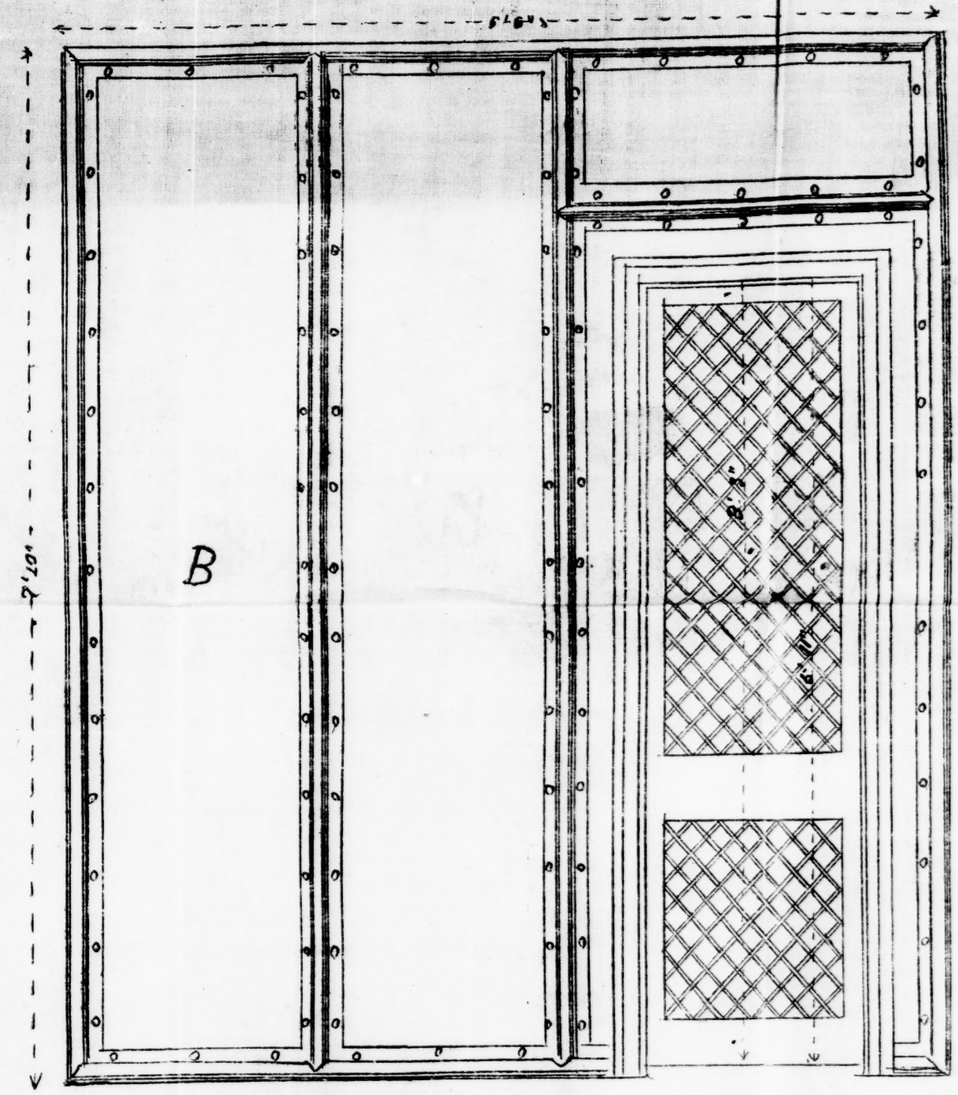


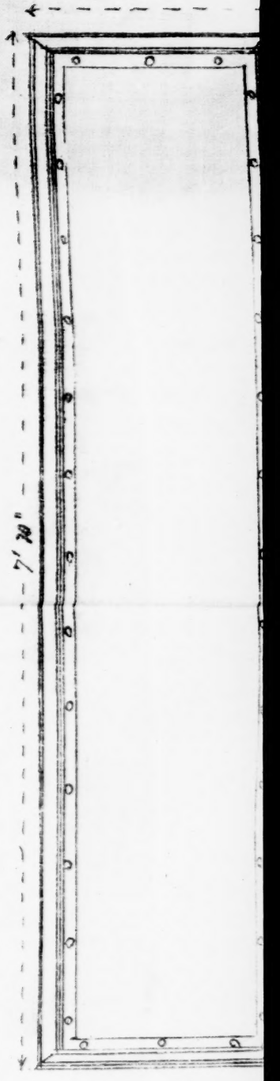
Side Elevation.

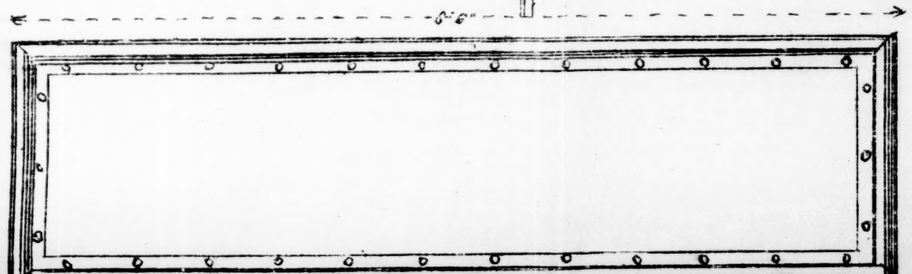


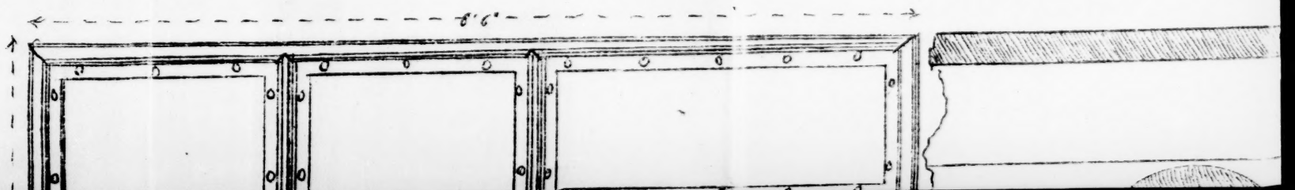
Front Elevation.

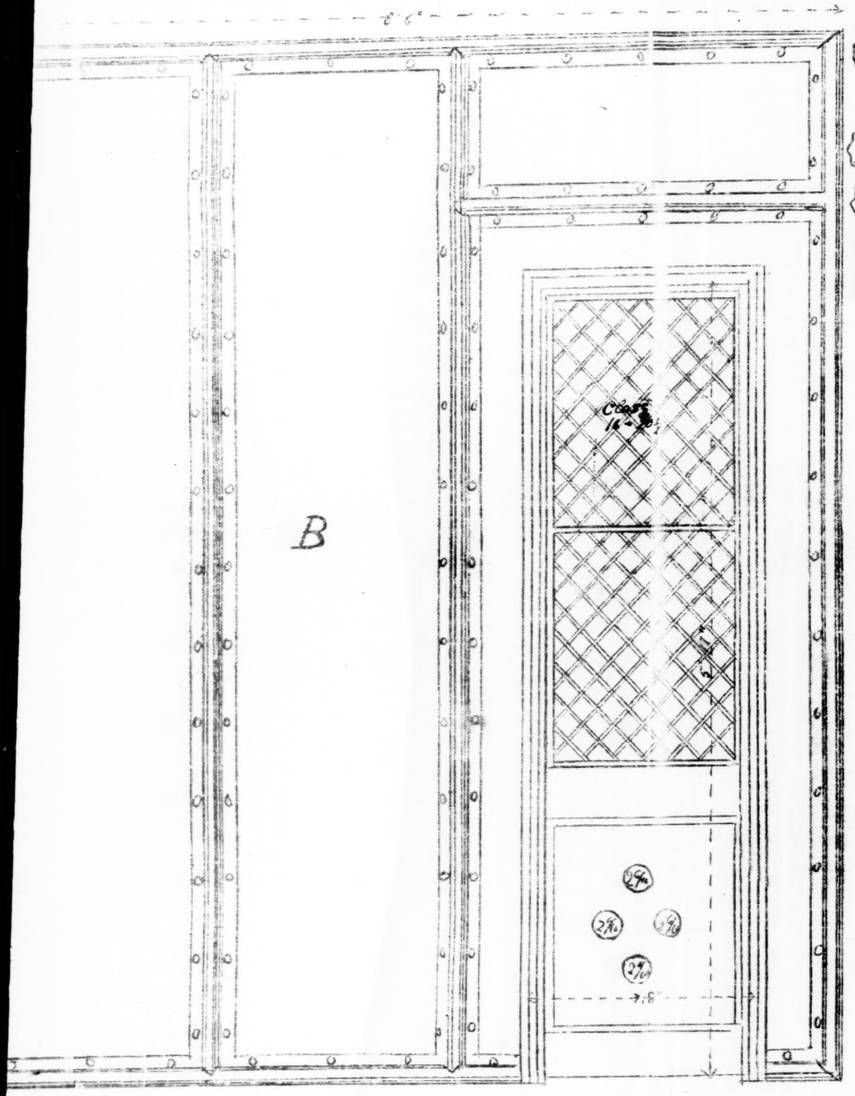

5'6"
8'0"
B
Plan.


5'6"
7'10"
B
Front Elevation.

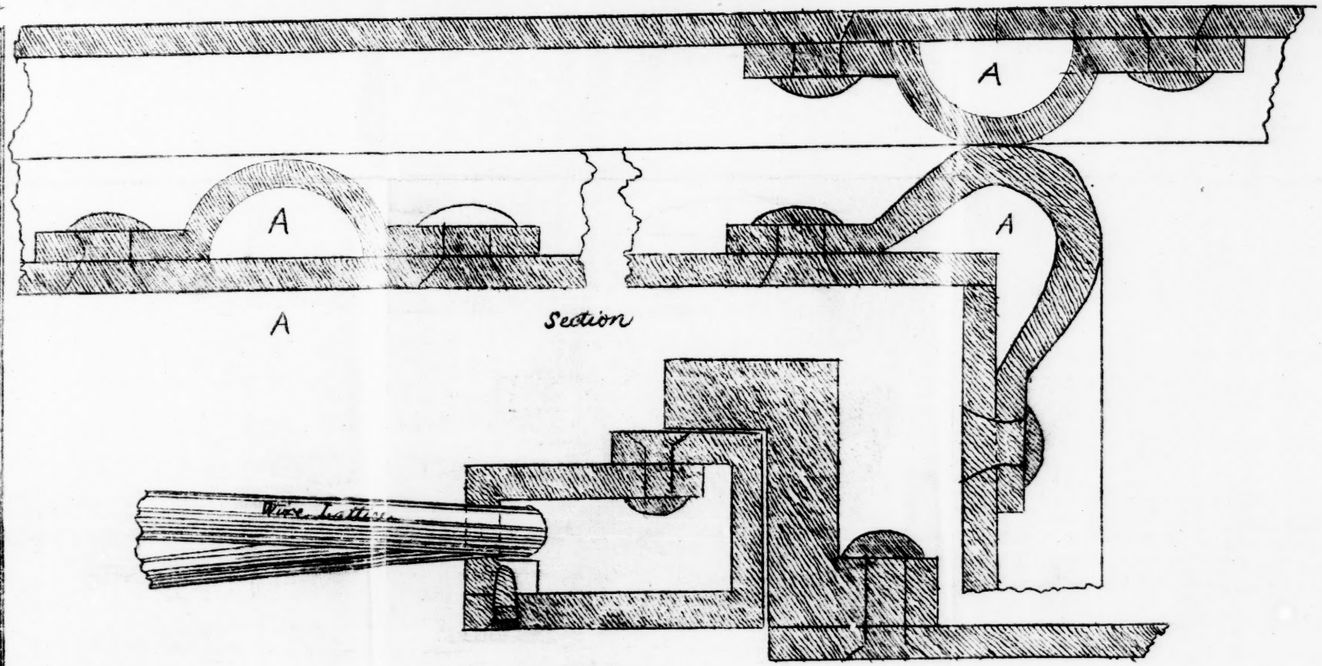

7'10"


5'6"

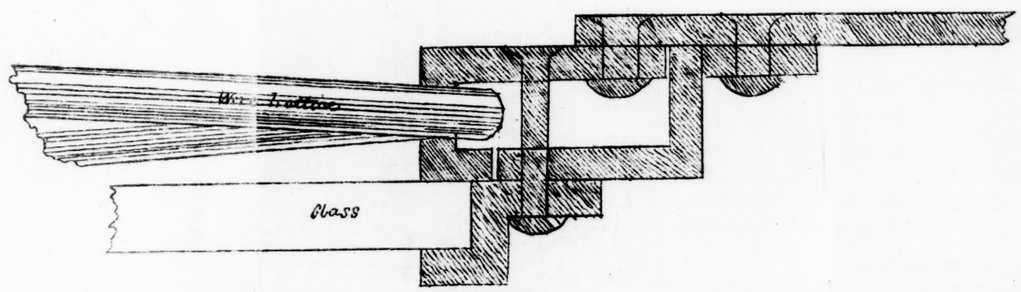

8'6"



Rear Elevation.



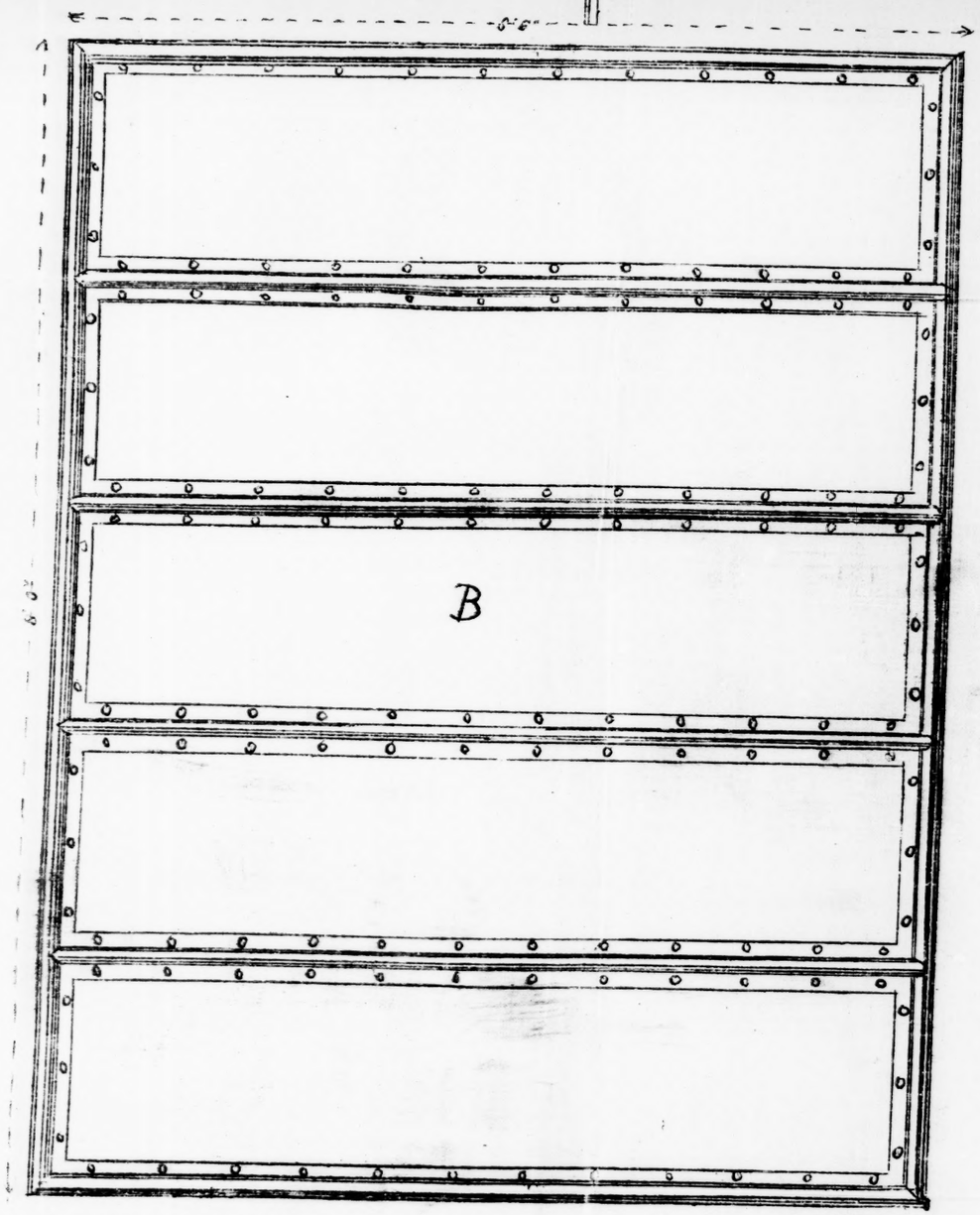
Section of Door & Casing.



Section of Rear Opening.

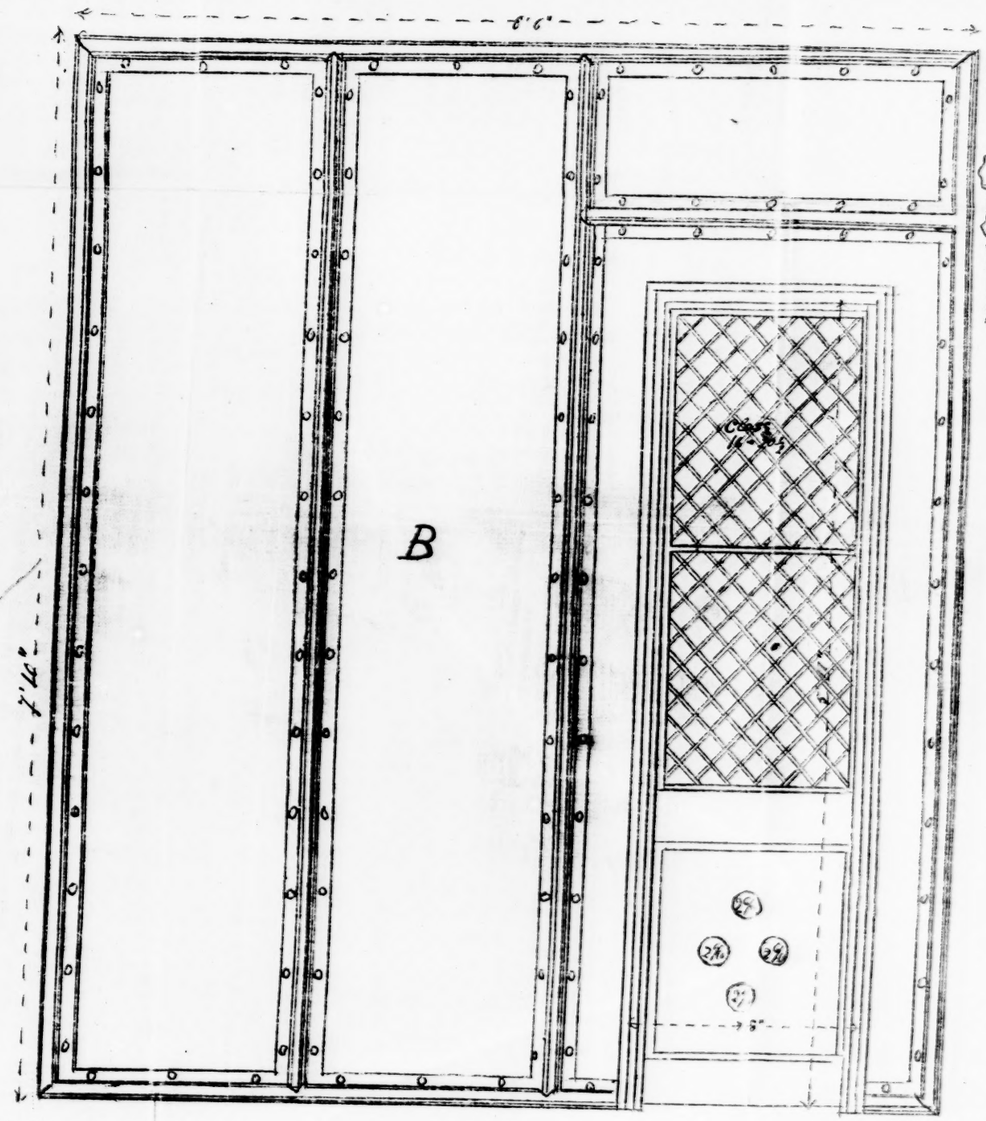
Exhibit C. annexed to I. Rager's affidavit
Page 140.

DETAIL OF IRON CELL



Top.

Scale 1 inch to 1 ft



Rear Elevation.

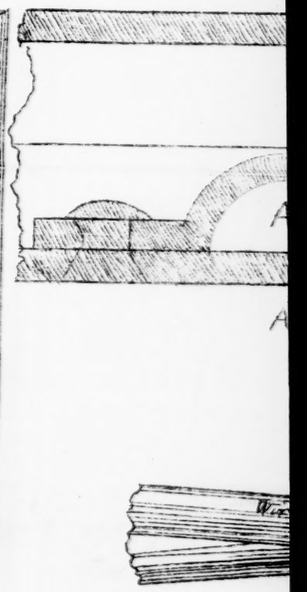


Exhibit C. arr

DETAIL OF IRON CEL

"A"

Ground Plan of Jail at Portsmouth Scioto County Ohio

Scale ¼ inch to the foot.

Drawing A referred to by the Mechanics Lien Law

Jacobs
vs
Baker

No 100 Jacobs
vs
Baker

Brick wall 13 in thick

Brick walls 13 in thick

Brick Wall 13 in thick

Space between cells & Brick wall 24 inches wide

Space between cells & Brick wall 24 inches wide

Space between Iron cells & Brick wall 24 inches wide

Space between Iron cells & Brick wall 24 inches wide

Space between cells & Brick wall 24 inches wide

Space between cells & Brick wall 24 inches wide

Cell 6×7 ft 8 ft high

Cell 6×7 ft 8 ft high

Cell 6×7 ft 8 ft high

Cell 6×7 ft 8 ft high

Cell 6×7 ft 8 ft high

Cell 6×7 ft 8 ft high

Cell 6×7 ft 8 ft high

Cell 6×7 ft 8 ft high

Iron Hall 10 × 24 feet 15 ft 6 in high

Ventilator

Ventilator

Iron Rail door

Entrance

Iron Rail door

Landing for Entrance to 2 story cells

Stairway

Cells

Kept 2 ft

Cells

Brick wall 13 in thick

Brick wall 13 in thick

Brick wall 13 in thick

Space between Iron cells & Brick wall 24 inches wide

Space between cells & Brick wall 24 inches wide

Cell 6×7 ft 8 ft high

Cell 6×7 ft 8 ft high

Cell 6×7 ft 8 ft high

Cell 6×7 ft 8 ft high

Ventilator

Ventilator

Iron Hall 10 × 24 feet 15 ft 6 in high

Space between Iron cells & Brick wall 24 inches wide

Brick Wall 13 in thick

35

Plan of 3rd & 4th Storeys
200ft

Elevation "A"
connected to Refrigerating offices
& Cattle Lairage Pens
Metres Pattern

Skylight

Skylight

Skylight

Skylight

Scale 1/8 = 1 Foot

196.6

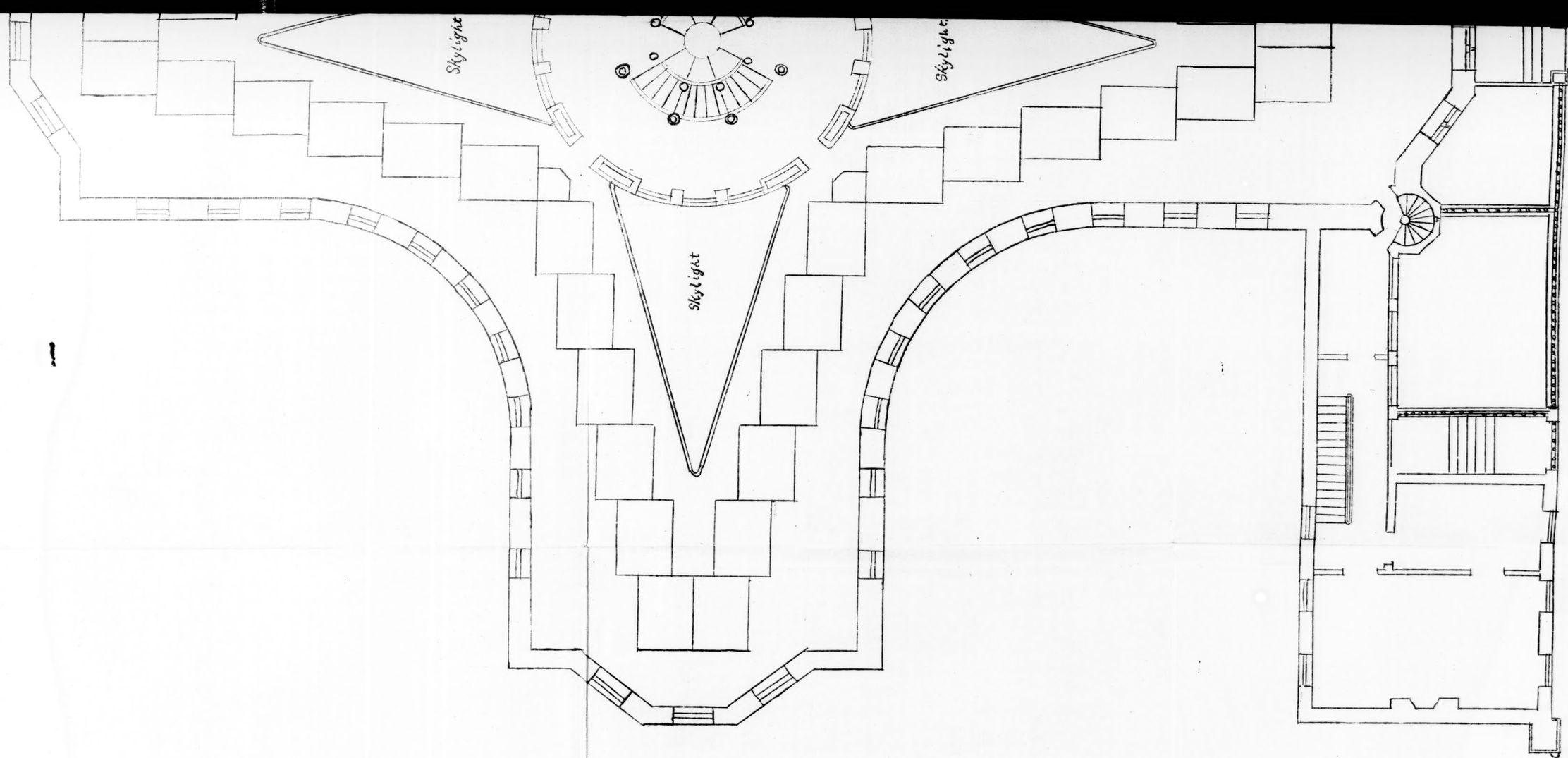
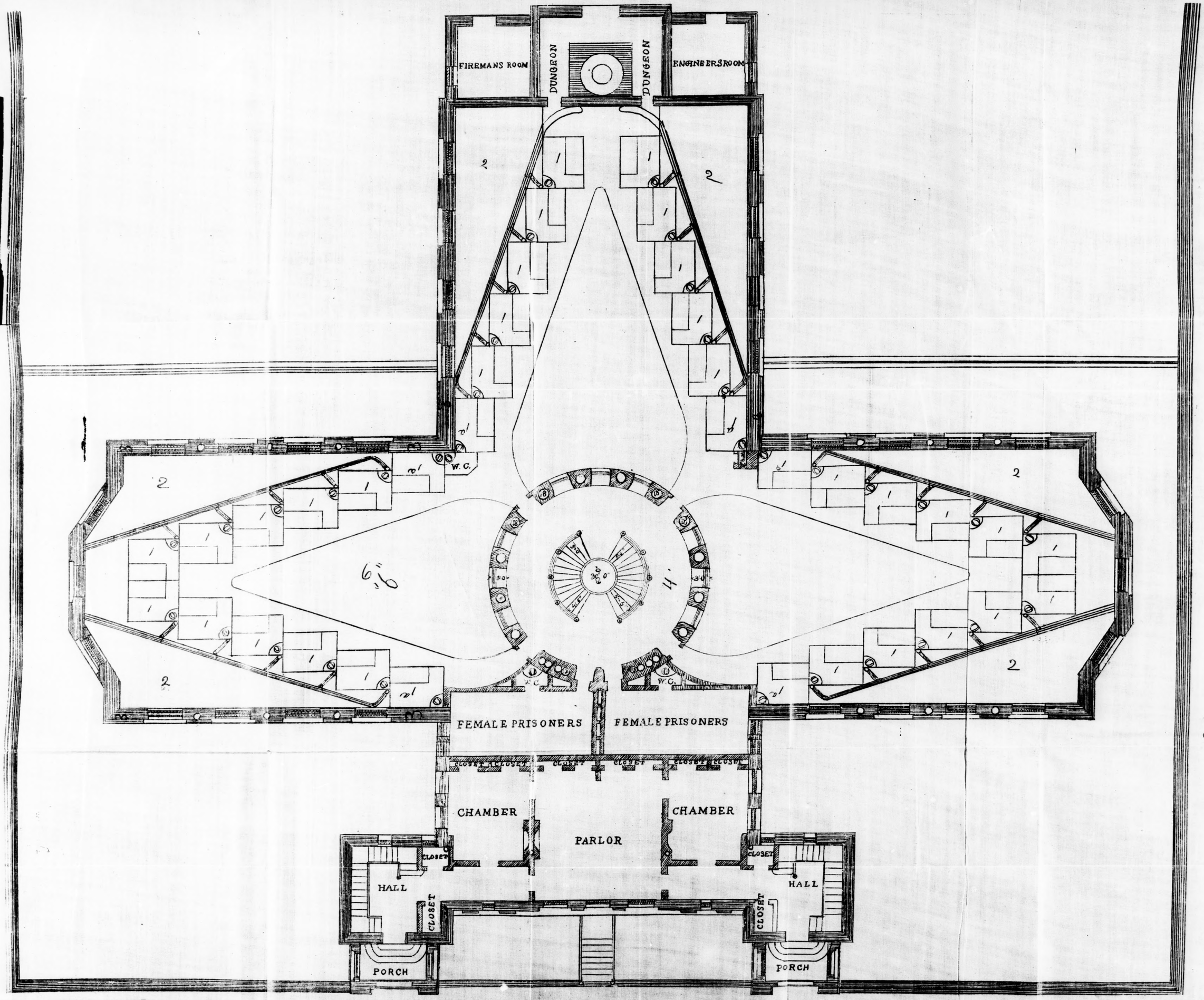


Exhibit A. annexed to I. Rogers affidavit



HAMILTON COUNTY JAIL PLAN PRINCIPAL STORY. *ISAIAH ROGERS, ARCHITECT.*

Exhibit B annexed to Rogers affidavit Page 139.
Saml Rullatthews
Notary Public

35

No 100 Jacobs et al Baker, Q

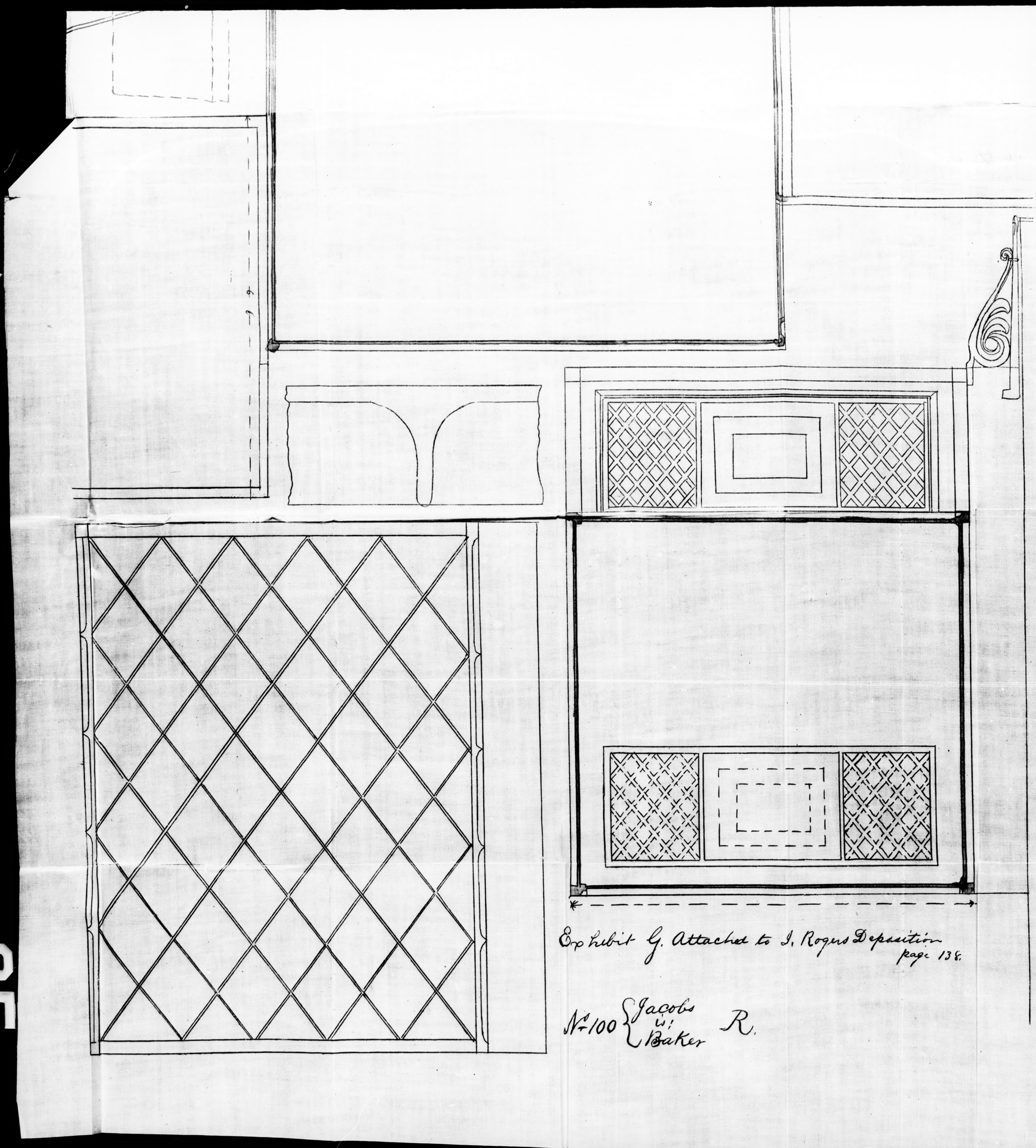
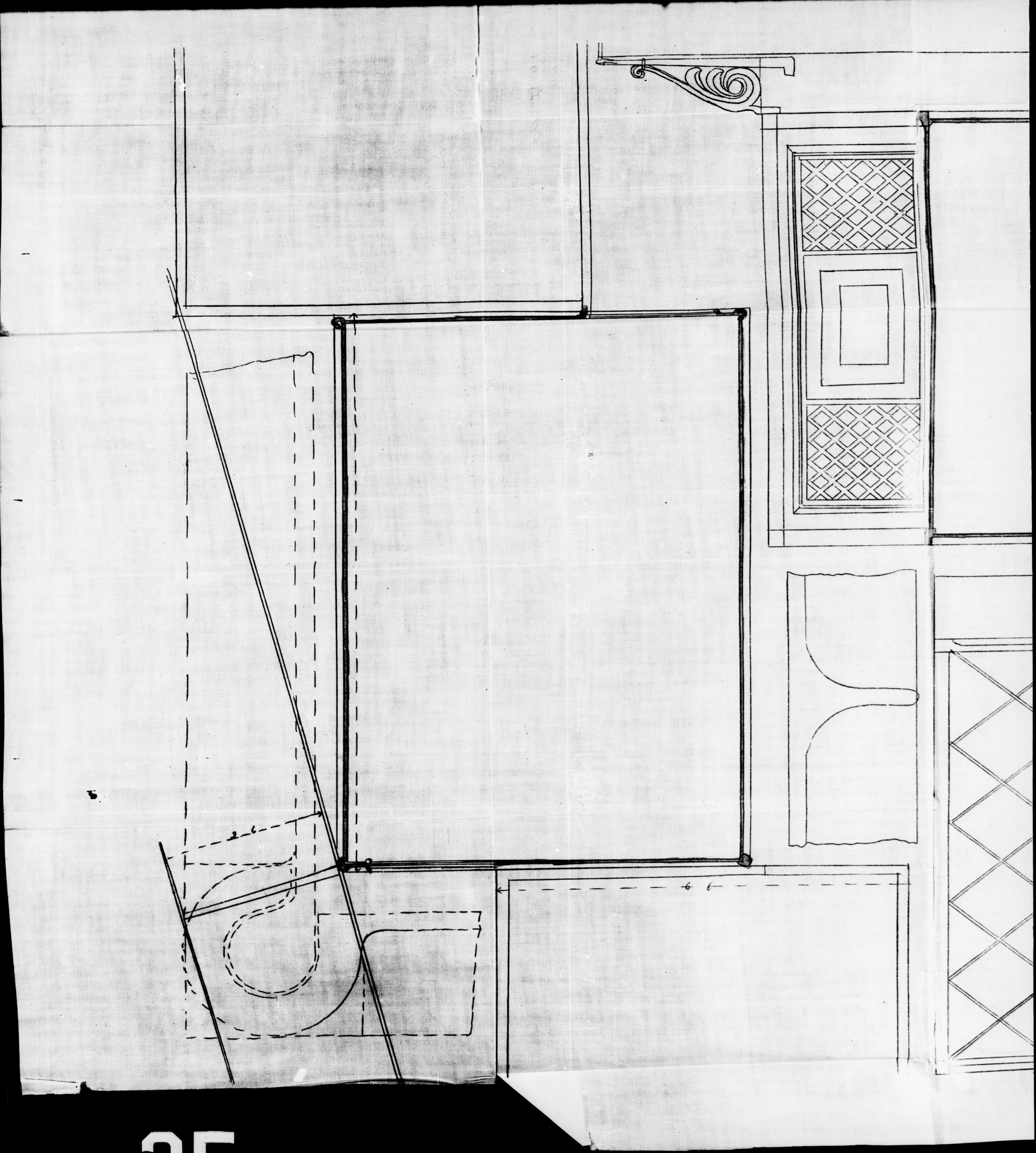


Exhibit G. Attached to I. Rogers Deposition page 138.

No 100 { Jacobs vs Baker } R.



St Louis Court of Common Pleas

John Maquire

vs.

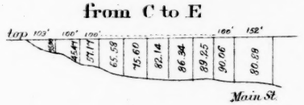
Benjamin Vice.

Map accompanying my report in this case.
N. F. Hyer, Cr. Surv.

Profile from C to D

from A to B

from C to E



No 253 Maguire vs. Tyler et al Page 188.

N. 15.30 W. 47. 28.

Western line of Survey 2974 as executed in 1833.

N. 15° 30 W. 47. 31.

North Western Boundary

Survey No. 3333.

Louis Labeaume

of the City of St. Louis

S. 74° 30 W 67. 08.

60.82

N. 74° 30 E. 33.88

21. 51

Old Road

Bellefontaine road

N. 13° 30 W 10.50

Rocky Br. by Milburn

Position of Labeaumes Western ditch as by Milburn

Eastern Boundary of the Common fields of St. Louis N. 1. 30 W.

58. 69 48 arp 1½ p.

Soulard

Ollivier

Bates

Columbia

Florida

McNaughty

Bowyer

E. Mound

Curb Stone

Old Stone

Master

Chambers

Madison

Jefferson

Monroe

N. Market

Benton

Wacon

Montgomery

Spring

Wright

Palm

Harrison

Labeaumes northern ditch

N. 29° W 58. 33⅓

Broadway

N. 74° 45 E. 11.66⅔

Joseph Brazeau

4 by 4 arp

Reserved by Brazeau

as his sale

to Labeaue

as claimed by

John Maquire

Sur. No. 3332

Joseph Brazeau

16 arp. 13. 6 lacs

Labeaumes ditch

N. 74° 30 E. 11.66⅔

N. 23° E W 15.24

Pierre Chouteau

Ether Claim

East Side of Main St.

N. 5° W. 22. 50

N. 9° W. 32. 71

Antoine Roy

10.50

8.35

Old Corner

Old Corner

11.66⅔

13.64

N. 74° 30 E. 11.66

Saw Mill

A

B

C

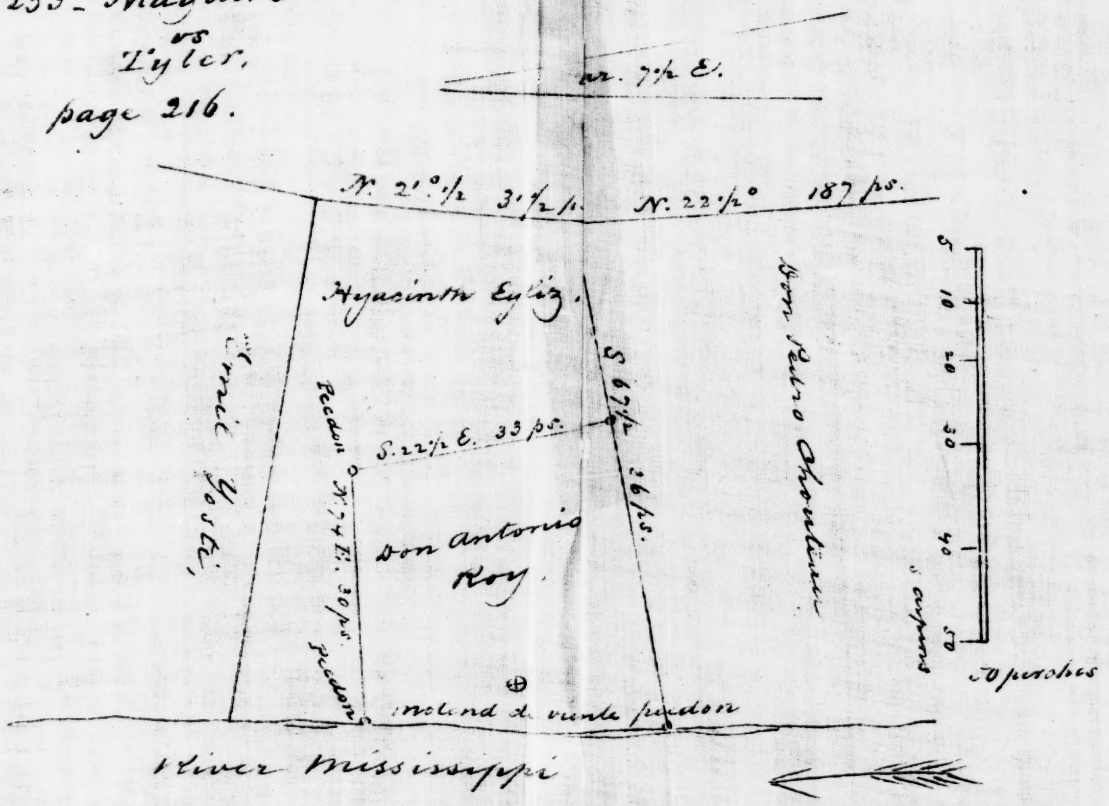
D

E

Var. 7° 40 E.

MISSISSIPPI RIVER

No. 253 - Maguire
vs
Tyler,
page 216.



Lopis Common Fields

A 3°.12 3°.40 3°.30 3°.44 3°.39 10°.65 6°.81 13°.56 B

Survey No 2874

Lopis Labauine

Survey No 3029 Lo Cam 118

Gabriel Cerre or his legal representatives

300 arpents 255 2/100 Acres

S.28 S.78 S.76 S.70 S.88 17.04

high ground

old Road

Labaumes Western ditch

N 25° W. 2°.85 l N 20.35 W 36°. 99

N 21° W 39°. 75

Survey No 204

Easton under Gabriel Cerre. rep^s

184 Arpens 156 12/100 acres.

Rocky Branch

17 38 acres 18 97/100 acres

20 43/100 arpens 20 43/100 arpens

16 arpens

E 4 arpens

Brazeaus reservation of 4 by 4 arpens

Brazeau's 4 by 4 arpens

4 arpens

4 arpens

4 arpens

D N. 14° W 35. 85 C

N 10° 15 W 8° 17

N 26° 10 W. Chains to mouth of Rocky Branch

high water

low bank

bluff bank

Mississippi River

Front Street Wharf

Scale of 6 chains 16 links to an inch

No 253 } Maguire vs Tyler sals Page 238.

Cozzens
Map

St Louis Common Fields

Survey No 287
Labadie

A

3°14' 3°40 3°30 3°44 3°39

5.08 5.76 5.76 5.70 5.88

17.09

high gro

Labaumes Western

front line of Common Fields of Lots

Survey No 671
93 01/100 arpens 94 12/100 acres

Peter Chateau

Esther 4 by 20 arpens

16 arpens

4 arpens
Brazeau's reservation
of 4 by 4 arpens

Brazeau's 4 by 4 arpens

16 arpens

4 arpens

4 arpens

High bluff bank

high water

N 26° 10 W

Front Street
Wharf

Mississippi River

School land

N 72

Antoine Roy
9 85/100 acres

Roy's land

Survey No 671
Antoine Labadie
Claim

Survey No 672
Antoine Labadie
Claim

Survey No 673
Antoine Labadie
Claim

Survey No 674
Antoine Labadie
Claim

Survey No 675
Antoine Labadie
Claim

Survey No 676
Antoine Labadie
Claim

Survey No

Big Mound
or
La Grange de terre
about 20' high
Stone
Hill on which stands the Big Mound
Stone
Stone

Profile of levels taken along the Eastern front line of the St. Louis Common Fields commencing at North edge of Mound St. 100 ft. southward from the South East corner of Surv.r N.o 1483 confirmed to Jos. Taillon as surveyed March 21st 1848 by Coote & Cozens.

Horizontal Scale 125 ft. to an inch
Vertical „ 12½ „ „

North edge of Mound St.
North edge of Brooklin St. also S.E. cor. of Sur 1484.
natural surface of Ground
Lebeaume's southern ditch
foot of hill.
North line of Esther's Concession

69.84	69.84	74.91	74.51	75.76	73.85	69.85	68.13	67.67	65.60	62.48	58.96	53.46	45.96	41.71	37.76	34.76	32.20	29.96	26.66	24.26	22.36	22.36	23.86	27.51	29.06
60	50	50	50	50	50	50	66	50	50	50	50	50	50	50	50	50	38	50	50	42	24	32	50	23	
a	0	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24

Datum line same as Directory of the City of St. Louis, being the curb in front of Block N.o 7.

Nº 253 Maguire vs Tyler et al Page 257.

Diagram

accompanying the Report of the Surveyor Gen.l to Com. of Gen.l Land Office of June 16th 1847

Spanish Sur. of the Concession of 360 arp to Louis Labeaume of February 15th 1792 ind.d the Concession to J. Brazeau, June 25th 1794; it contains 374 arp, of which 356 were conf.d to Labeaume and 4 arp (square) to Brazeau.

16. arp
23 arp
13 arp 6 p.s
3 arp 6 p.s

Front line of the St. Louis Common Field

J. Clamorgan
A. Soulard
Widow Yosti
J. Mullanphy and H. Eglize
3 arp
3 arp 2½ p.s
3 arp 6 p.s
St. Antoine
4 arp
3 arp 6 p.s
3 arp 6 p.s

18 arp 7½ p.s.

Part of Choulteaus claim abandoned

Grand de Terre

4 by 20 arp. to Esther of Oct. 5th 1793 conf.d July 4th 1836

Oct 16th 1799 Sp. S. of 133 arp 4 perch and ½ N.o 671 93 arp 1 perch and ½

Part of Chouteaus claim, cut off from the Sp. Sur. and now covered by the N.M. Sur of H. Peyroux.

4 arp
Reserve of 4 arp by Brazeau, in his deed to Labeaume of May 9th 1798, and conf.d to Brazeau under Cert. N.o

Concession to Joseph Brazeau 4 by 20 arp June 25th 1794.

MISSISSIPPI RIVER

38

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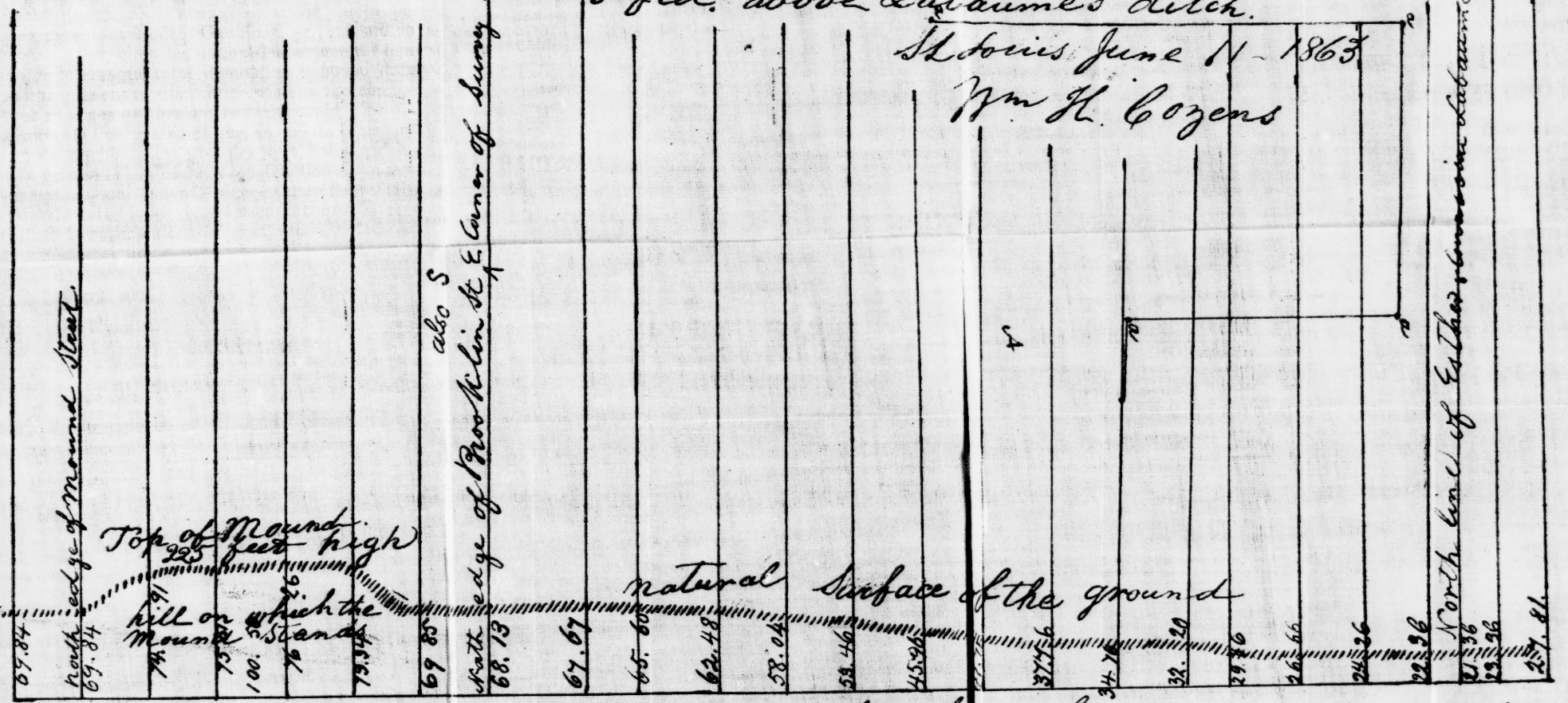
Profile of Levels taken along the Eastern or front line of the St Louis Common fields. Commencing at North edge of Mound Street and running Northwardly along the said Common field line, and passing along western Slope of said Big Mound taken March 21. 1848.

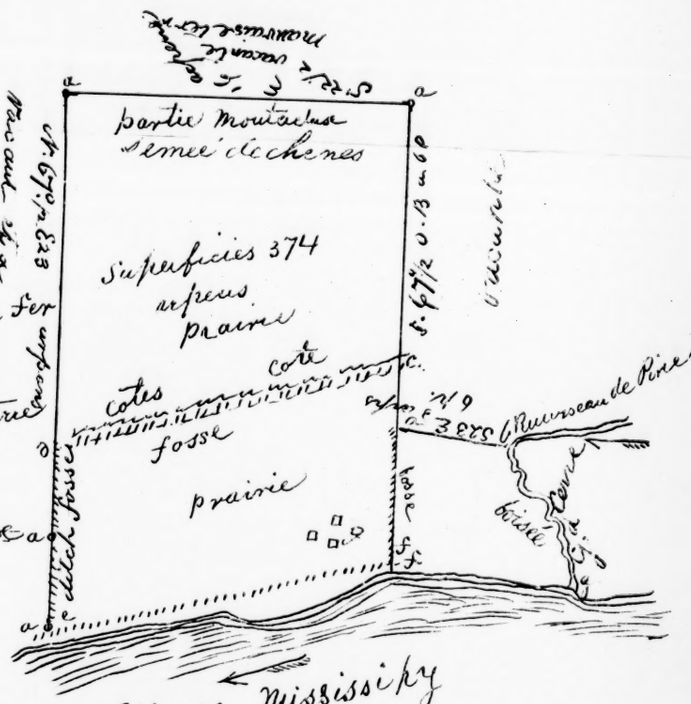
The horizontal and perpendicular distances are laid down to a Uniform Scale, and are without the usual exagerations.

The top of the Mound is 25 feet above the hill on which it now Stands and 78 feet above Labaume's ditch. The hill on which the mound Stands is 53 feet above Labaume's ditch.



Datum line Same as the Curb Stone in front Street between Market and Walnut Streets in the City of St. Louis

No 13 Dn Louis Labaume



Notes

a. bornes de pierres, temoins de marche fer

b. un Liard, dans le Ruisseau

c. d. e. f. qui designent l'etendue de terre close par un fossé

g. Maison de pierre Cabanne, grange &c

Située a 3 Milles environ dans le N de St. Louis.

Arpentée le 2 Mars 1799 en vertue du decret de Mr. le Lut. Gouv en datte du 15 Fevr. Certificat d'Arpentage. Expedié le 10. avril dlt.

Office of the Surveyor General for Illinois
St. Louis 20 april 1853.

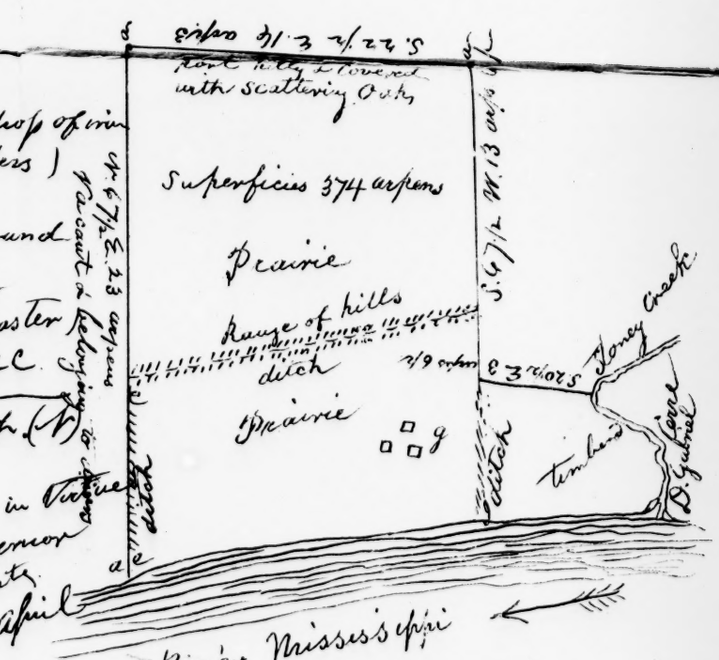
I certify that the above plots & the Marginal notes and references thereto are correctly copied from page 130 of Registre d'Arpentage, Kept in this office

D. C. A. Spaulding
Surveyor General

Translation of above

No 13.

Dn Louis Labaume



Note

a. bounds of Stone witnessed with drop of iron (or Smith Cinders)

b. a Cottonwood, in the Creek

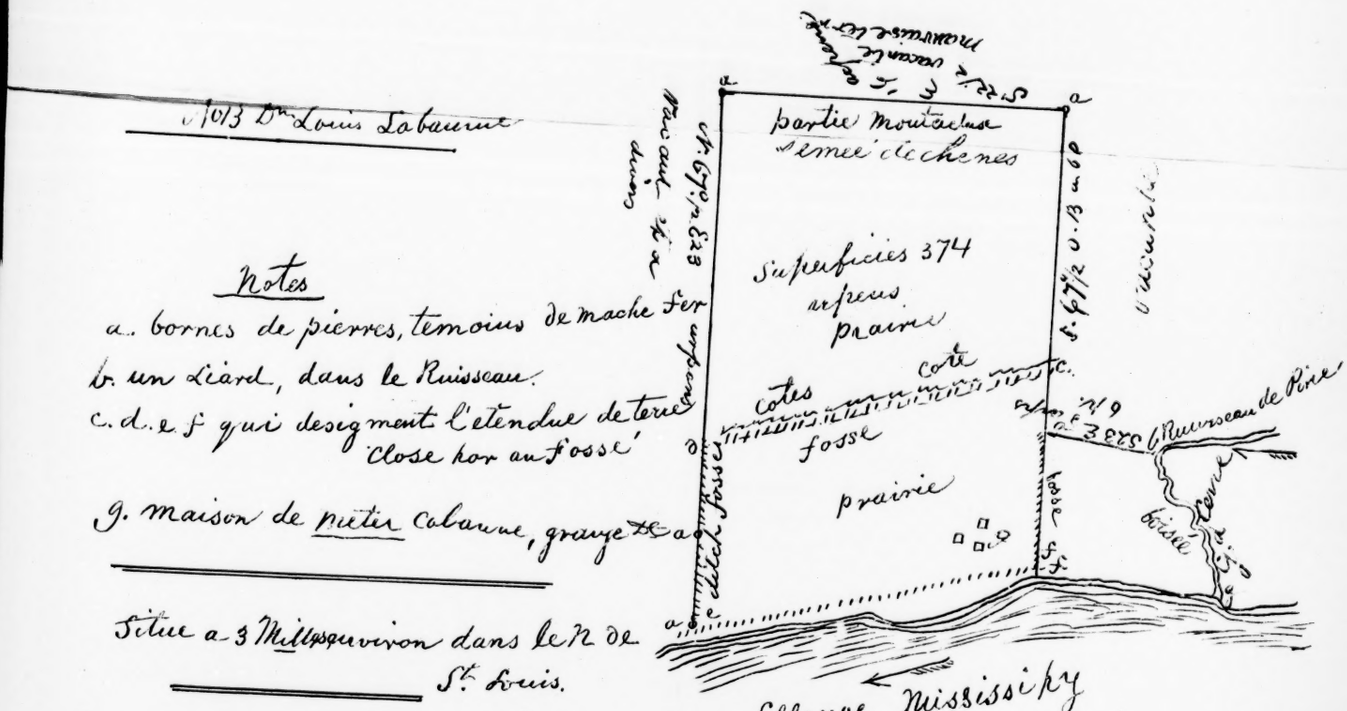
c. d. e. f. designate the extent of ground inclosed by a ditch

g. house of the owner (tutherly Master - maitre) Cabin born &c.

Situate about 3 miles North (W) of St. Louis

Surveyed on the 2 March 1799 in Virtue of decree from the Lieutenant Governor dated the 15th of July. Certificate of Survey delivered on the 15 April

No 253 Maguire vs Tyler et al. Page 543.



No 13 Dn Louis Labaume

Notes

a. bornes de pierres, temoins de marche fer

b. un Liard, dans le Ruisseau

c. d. e f qui designent l'etendue de terre close par un fossé

g. Maison de Pierre Labaume, grange &c a

Situe a 3 Milles environ dans le N de St. Louis.

Arpentié le 2 Mars 1799 en vertue du decret de Mr. le Lut. Gouverneur datte du 15 Fevr. Certificat d'Arpentage. Expedie le 10. avril dsp

Office of the Surveyor General for Illinois
St. Louis 20 april 1853.

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D. C. A. Spalding
Surveyor General

Translation of above

No 13.

Dn Louis Labaume

Note

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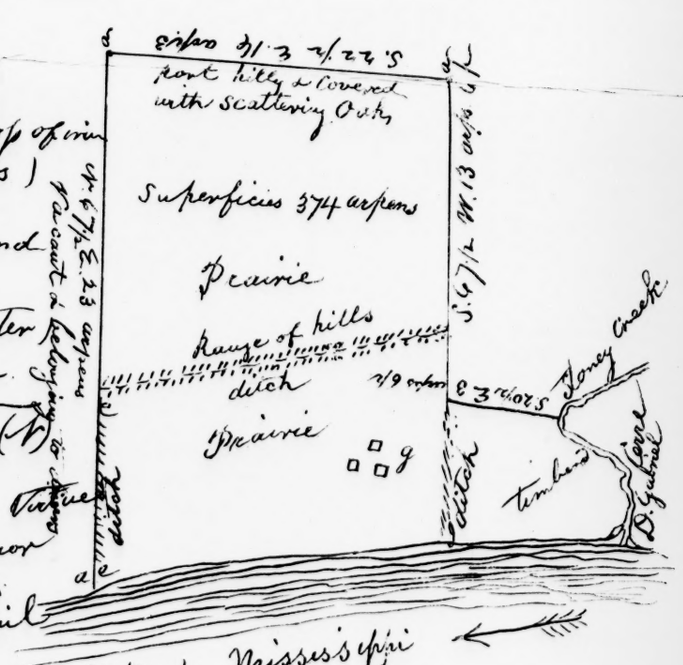
b. a Cottonwood, in the Creek

c. d. e. f. designate the extent of ground inclosed by a ditch

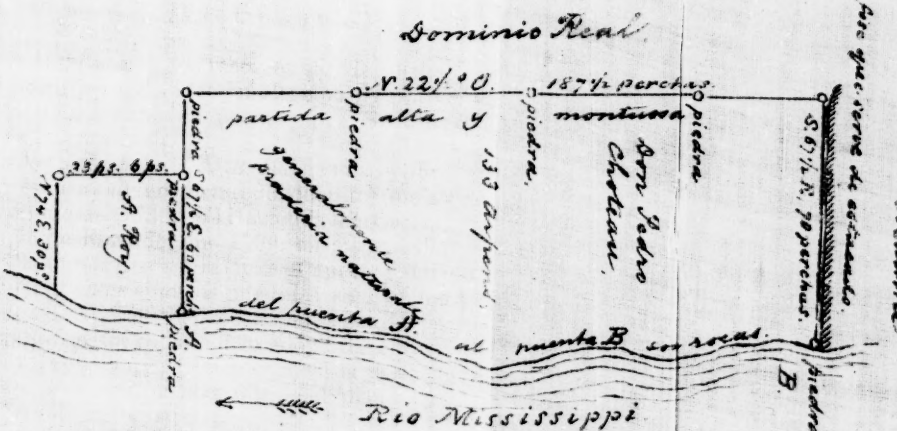
g. house of the owner (tutlerly Master - maitre) wherein born &c.

Situated about 3 miles North (W) of St. Louis

Surveyed on the 2 March 1799 in virtue of decree from the Lieutenant Governor dated the 15th of July: certificate of Survey delivered on the 15 April



No 253 } Maguire vs Tyler et al } Reg 543.



No. 253, — Tyler et al.
vs. Adms.
Maguire,

page 66.

No. 253. Tyler et al.
adms.
vs.
Maguire, Page 615.

No. 13.
Dn. Louis Lebeaurre

Nota.

a. bornes de pierres. témoins de marche fer,

b. un Liard, dans le Ruisseau,

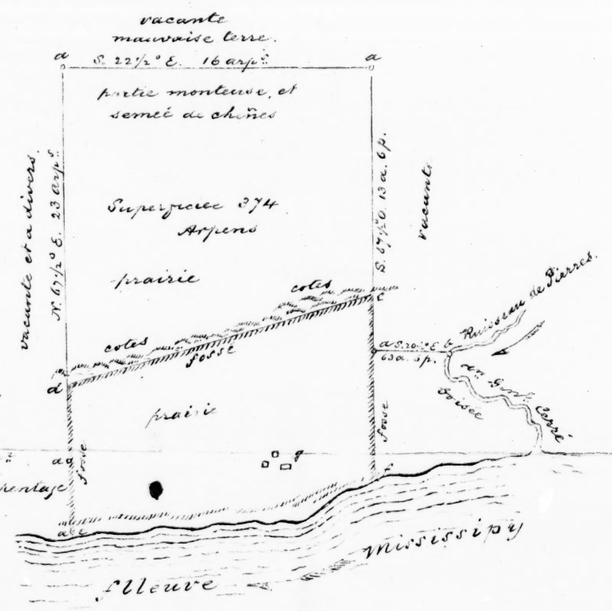
c. d. E. F. qui designent l'etandue de terre, close par un fossé.

g. maison de maitre, cabanne, grange &c.

Situé à 3 milles environ dans le N. de St. Louis.

Arpenté le 2 Mars 1799, en vertu du decret de Mr. le Lnt. Gouv.r en datte du 15 Fev.r - Certificat d'Arpentage expedié le 10 Avril.

D.



Office of the Surveyor General for Illinois and Missouri,
St. Louis, 20th of April 1853.

I certify that the above plat, with the marginal notes and references thereto, are correctly copied from page 130 of "Registre d'Arpentage", kept in this Office.

D. A. Spaulding.
Surveyor General,

Translation of the above.

No. 13
Dn. Louis Lebeaume

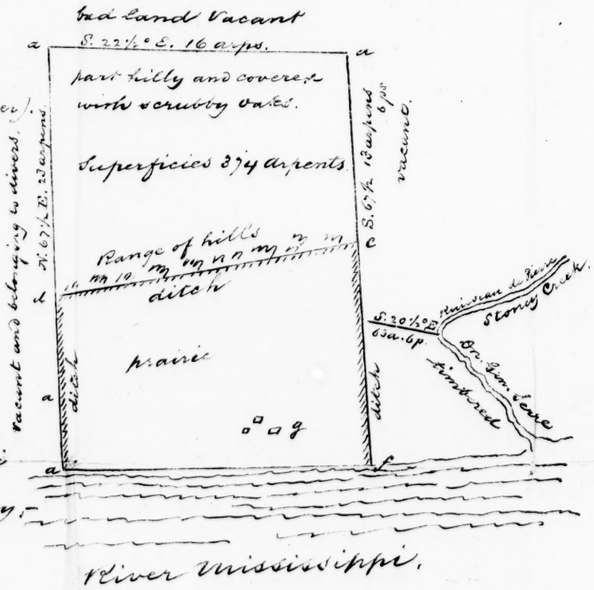
Note.

a. bounds of stone, witnessed with dross of iron (or Smiths cinder).

b. a Cottonwood in the Creek.

c. d. e. f. designate the extent of ground enclosed by a ditch,

g. house of the owner (literally Master = maitre) cabin, barn &c.

Situated at about 3 miles North (N.) of St. Louis.

Surveyed on the 2d. March 1799, in virtue of the decree from the Lieutenant Governor, dated the 15th February. - Certificate of Survey delivered the 15th April.